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No. 97-____ OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

FRANK KEATING, Governor of the State of Oklahoma and KEN FEAGINS, a non-resident individual,

Petitioners,

—v.—

STATE OF OKLAHOMA *ex rel.*, OKLAHOMA TAX COMMISSION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF OKLAHOMA – DIVISION NO. 1

PETITION FOR WRIT OF CERTIORARI

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37 pp

QUESTIONS PRESENTED

Should the U.S. Supreme Court's holding in *Maxwell v. Bugbee*, 250 U.S. 525 (1919), be reconsidered?

Does the federal constitution bar a state from predicating the progressive rate at which nonresidents pay State income tax upon their total income, wherever earned, including extraterritorial income from a source having no nexus to the State?

Did the court below err in holding that an amendment to Section 2362 of the Oklahoma Tax Code, which discriminates against nonresidents by indirectly taxing their extraterritorial income from a source having no nexus to the State does not violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution?

PARTIES TO THE PROCEEDING

Respondent the State of Oklahoma, ex rel., the Oklahoma Tax Commission was the Respondent-Appellee below. Petitioner Governor Frank Keating succeeded Governor David Walters as Governor of the State of Oklahoma and is automatically substituted as a party pursuant to Sup.Ct.Rule 35.3. Governor Walters and Ken Feagins were the Petitioners-Appellants below.

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FRANK KEATING, Governor of the State of Oklahoma and KEN FEAGINS, a nonresident individual,

Petitioners,

—v.—

STATE OF OKLAHOMA, *ex rel.*, OKLAHOMA TAX COMMISSION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF OKLAHOMA–DIVISION NO. 1

PETITION FOR WRIT OF CERTIORARI

Petitioners Governor Frank Keating and Ken Feagins ("Petitioners") respectfully petition for a Writ of Certiorari to review the judgment of the Court of Appeals of the State of Oklahoma–Division No.1 – in this case.

OPINIONS BELOW

The opinion of the Court of Appeals of the State of Oklahoma below, dated August 23, 1996, is reported at 935 P.2d 398 (Okla.Ct.App. 1996); App. 1a.[1] The Order and Judgment

[1] "App." refers to the appendix filed with this Petition for a Writ of Certiorari.

of the District Court of Oklahoma County of the State of Oklahoma below, dated January 30, 1995, is reproduced at App. 9a. The Order of the Oklahoma Supreme Court denying Certiorari, dated March 5, 1997, is reproduced at App. 13a. The dissenting opinion of Oklahoma Supreme Court Justice Hodges, dissenting from denial of certiorari, dated March 5, 1997, is reproduced at App. 14a.

JURISDICTION

The Oklahoma Supreme Court denied Certiorari on March 5, 1997. On May 23, 1997, Justice Breyer extended the time to file this Petition for a Writ of Certiorari ("Petition") to and including July 3, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case invokes the Due Process Clause of the Fourteenth Amendment to the United States Constitution, U.S. Const. amend. XIV, which provides that "nor shall any State deprive any person of life, liberty, or property, without due process of law".

The statute which Petitioners seek to have declared unconstitutional is Section 2362 of the Oklahoma Tax Code ("Section 2362")[2], which provides in relevant part:

> "For tax years beginning on or after January 1, 1994, the Oklahoma taxable income of a . . . nonresident individual . . . shall be calculated . . . as if all income were earned in Oklahoma.

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[2] 68 O.S. 1991, § 2362 is reproduced in relevant part in *Walters II*, *infra*, at App. 2a.

> Using Oklahoma income tax rates, . . . nonresident individuals . . . shall compute their tax liability on the amount computed in the preceding paragraph.
>
> From the liability computed there shall be deducted all allowable credits to determine the amount of tax due.
>
> . . . nonresident individuals . . . shall divide adjusted gross income from Oklahoma sources by the adjusted gross income from all sources to arrive at the applicable percentage that Oklahoma adjusted gross income represents of all adjusted income received by the taxpayer in the income year.
>
> . . . nonresident individuals . . . shall multiply the amount of Oklahoma tax computed by the applicable percentage calculated in the preceding paragraph in order to determine the amount of income tax which must be paid to the State of Oklahoma. Nothing in this section shall be construed to allow for greater than one hundred percent (100%) of a taxpayer's income to be taxed. . . ."

STATEMENT

This Petition seeks certiorari to review a judgment of the Court of Appeals of the State of Oklahoma–Division No. 1, which held that Section 27 of S.B. 1121, which amended Section 2362 of the Oklahoma Tax Code, was not unconstitutional under the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution, the Privileges and Immunities Clause or the Commerce Clause of the United States Constitution. In this Petition, only review pursuant to the Due Process Clause is sought.[3] Section

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[3] The Court recently granted certiorari in a separate case involving state taxation of nonresidents, *Lunding v. Tax Appeals Tribunal*, 89 N.Y.2d 283, 675 N.E.2d 816, 653 N.Y.S.2d 62 (1996) ("*Lunding*"). The Petitioners in *Lunding* "seek to have declared unconstitutional Section

27 of S.B. 1121 amended Section 2362 of the Oklahoma Tax Code to change the method of calculating the state income tax liability of nonresident individuals and part-year resident individuals.[4]

The procedural history of the case is correctly summarized in the opinion below of the Court of Appeals of the State of Oklahoma–Division No.1. Challenges to Section 2362 on federal constitutional grounds explicitly were raised by Petitioners at all stages of the proceedings in the courts below. *See Walters et al., v. State of Oklahoma ex rel. Oklahoma Tax Comm'n*, 935 P.2d 398, 400 (Okla.App. 1996), *cert. denied*, (Okla. March 5, 1997) ("*Walters II*"), reproduced at App. 1a; Summary Judgment of the District Court, C.J.-94-4997-64 (January 30, 1995), reproduced at App. 9a.

The relevant facts are quite simple and are set forth in *Walters II*. Senate Bill 1121 was enacted by the Oklahoma Legislature in 1994. Among other things, it amended Section 2362 of the Oklahoma Tax Code to change the method of calculating state income tax for nonresident individuals. *See Walters II*, 935 P.2d at 399-400, reproduced at App. 9a. Prior to the amendment, Section 2362 provided that the taxable income of a nonresident individual was the same as if he or she were a resident individual and the nonresident's adjusted gross income as reported to the federal government was excludable from state taxable income unless the income was attributable to ownership of property, conduct of business, trade, or profession, or other business or property in Okla-

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631(b)(6) of the New York Tax Law, which provides that "The deduction allowed by section two hundred fifteen of the internal revenue code, relating to alimony, shall not constitute a deduction derived from New York sources." The constitutional provision relied on by the Petitioners in *Lunding* is the Privileges and Immunities Clause, U.S. Const. Article IV, Section 2.

[4] Although Section 2362 of the Oklahoma Tax Code applies to both nonresidents and part-year residents, this Petition addresses only nonresidents.

homa. *See Walters II*, 935 P.2d at 400; App. 2a-3a. Section 27 of S.B. 1121 amended Section 2362 to predicate the Oklahoma progressive income tax rate applicable to nonresidents on their total income, wherever earned, to calculate their Oklahoma income tax liability. Pursuant to Section 2362, the calculation of nonresidents' Oklahoma income tax liability currently takes into account income earned outside of Oklahoma from a source having no nexus with either the State or the benefits and protections afforded thereby. It is conceded that the exaction is, subsequently, prorated according to the percentage of the nonresident taxpayer's income earned in Oklahoma. *See Walters II*, 935 P.2d at 399-400; reproduced at App. 2a-3a. Nonetheless, the initial computation using income from sources having no nexus with the State serves to place the nonresident taxpayer in a higher tax rate.

It is undisputed that prior to the enactment of Section 27 of S.B. 1121, the Oklahoma Tax Commission predicted that the amendment to Section 2362 would raise an estimated 18 million dollars per year in additional revenue. *See Walters II*, 935 P.2d at 401, reproduced at App. 5a. The formalistic euphemism placed on the amendment in anticipation of the 18 million dollar per year increase in exactions from nonresident taxpayers was "tax equity." It contended that "§ 27 does not impose a tax on such out-of-state income, but merely uses that income in calculating the rate at which Oklahoma-derived income shall be taxed." However, at least one member of the Oklahoma Supreme Court has acknowledged that "[t]he **effect of Senate Bill 1121 is to increase the taxes of a significant number of nonresidents and part-time residents.**" *Compare Walters II*, 935 P.2d at 400 & 402 (emphasis added), reproduced at App. 3a & 7a, *with*, dissenting opinion of Oklahoma Supreme Court Justice Hodges in *Walters II*, dissenting from denial of certiorari, reproduced at App. 15a.

It is conceded that Section 27 of S.B. 1121 does not necessarily mandate an increase in the Oklahoma income tax liability of all nonresidents. If a nonresident taxpayer suffers

losses from his or her out-of-state business, the nonresident's Oklahoma income tax liability would actually be decreased. *See Walters II*, 935 P.2d at 401, reproduced at App. 5a.

In order to appreciate fully the genesis and context of the matters raised in this Petition, it is necessary to place in historical context the specific holding of *Maxwell v. Bugbee*, 250 U.S. 525 (1919). *See also Great Atlantic & Pacific Tea Co. v. Grosjean*, 301 U.S. 412 (1937). In addition, it is necessary to understand Justice Holmes' dissenting opinion in *Maxwell* as it relates to the current practical operation of, and economic realities visited upon, nonresident taxpayers by Section 2362 of the Oklahoma Tax Code. Similar progressive state income tax statutes which take into account nonresidents' extraterritorial income from a source having no nexus to the taxing jurisdiction have been upheld under *Maxwell*, a privilege death tax case.

In *Maxwell*, the United States Supreme Court adopted a formalistic approach acceptable in 1919 to review a New Jersey progressive inheritance tax statute that required the inclusion of the entire estate of a nonresident decedent, wherever the property was located, to determine the rate by which the New Jersey property would be taxed. The New Jersey progressive inheritance statute in *Maxwell* calculated the rate of tax by including the nonresident decedent's entire estate, wherever located, including extraterritorial property located outside of New Jersey. The statute subsequently reduced the tax amount to reflect the percentage of the nonresident decedent's estate located in New Jersey. *Compare Walters II*, 935 P.2d at 399-400, reproduced at App. 2a-3a, *with, Maxwell*, 250 U.S. at 532-33. In *Maxwell* a divided Court (5/4 decision) upheld the New Jersey inheritance statute and rejected the challenges to the statute pursuant to various provisions of the federal constitution, including the Due Process Clause.

In rejecting the due process argument that an economic reality of the statute was an increase in exaction and an

extraterritorial tax which resulted in a deprivation of nonresident decedents' property without due process in violation of the Fourteenth Amendment to the U.S. Constitution, five members of the divided Court employed a formalistic approach to decision-making and stated:

> "It is not disputed that, consistently with the Federal Constitution, a State may not tax property beyond its territorial jurisdiction, but the subject-matter here regulated is a *privilege* to succeed to property which is within the jurisdiction of the State.
>
> * * *
>
> In the present case the State imposes a *privilege tax*, clearly within its authority, and it has adopted as *a measure of that tax* the proportion which the specified local property bears to the entire estate of the decedent. . . . The transfer of certain property within the State is taxed by a rule which considers the entire estate in arriving at the amount of tax. *It is in no just sense a tax upon the foreign property, real or personal.*"

Maxwell, 250 U.S. at 539 (emphasis added).

On the other hand, four members of the divided *Maxwell* Court, including Justice Holmes, rejected the majority's formalism. They applied an economic realities and practical operation approach to the statute and determined that New Jersey's inclusion of property beyond its jurisdictional borders in the calculation of the exaction from the nonresident decedents amounted to an indirect tax on the extraterritorial property. This approach focused on the *practical operation* of the statute and its corresponding economic realities upon nonresident taxpayers. Pursuant to this approach, the New Jersey statute effected an indirect tax and deprivation upon nonresident decedents' extraterritorial property beyond New Jersey's taxing authority. In effect, it amounted to an unconstitutional deprivation of property without due process. Justice Holmes stated in relevant part:

> "It seems to me that *when property outside the State is taken into account for the purpose of increasing the tax upon property within it, the property outside is taxed in effect, no matter what form of words may be used.* It appears to me that this cannot be done, even if it should be done in such a way as to secure equality between residents in New Jersey and those in other States."

Maxwell, 250 U.S. at 544 (Holmes, J., dissenting) (emphasis added).

The majority's holding in *Maxwell* has been called into question by both the United States Supreme Court and commentators. *See Frick v. Pennsylvania*, 268 U.S. 473, 495 (1924) (*noting* that the *Maxwell* holding "is on the border line, as is evidenced by the dissent of four members of the court."). *See*, Walter Hellerstein, *Some Reflections on the State Taxation of a Nonresident's Personal Income*, 72 Mich.L.Rev.1308, 1317 n.53 (1974); Charles L.B. Lowndes, *Rate and Measure in Jurisdiction to Tax—Aftermath of Maxwell v. Bugbee*, 49 Harv.L.Rev. 756, 768-773 (1936) (*discussing* the application of the Maxwell holding to a progressive income tax); *id.* at 770 (stating "[i]t is difficult, however, to imagine anything more iniquitously unfair than the application of the *Maxwell v. Bugbee* formula to income taxation in the present state of the decisions on state jurisdiction to tax income.").

It is conceded that several states' highest courts in addition to the court below in *Walters II* and at least one federal court of appeals have recently relied upon *Maxwell* to uphold under various provisions of the United States Constitution state income taxation schemes that operate like Section 2362 of the Oklahoma Tax Code. *See, e.g., Matteson v. Director of Revenue, State of Missouri*, 909 S.W.2d 356, 358-59 (Mo. 1995); *Brady v. State*, 607 N.E.2d 1060 (N.Y. Ct. App. 1992), *cert. denied*, 113 S.Ct. 2998 (1993); *Stevens v. State Tax Assessor*, 571 A.2d 1195, 1197 (Me. 1990), *cert. denied*, 498 U.S. 819

(1990); *Aronov v. Secretary of Revenue*, 371 S.E.2d 468, 471 (N.C. 1988), *cert. denied*, 489 U.S. 1096 (1989); *Wheeler v. State*, 249 A.2d 887, 891 (Vt. 1969), *appeal dismissed*, 396 U.S. 4 (1969). *See United States v. Kansas*, 810 F.2d 935, 938 (10th Cir. 1987).

Maxwell was decided in 1919 and was a 5/4 decision. It was decided in a time before commercial airlines, interstate highways and speed limits of 70 m.p.h. made interstate employment opportunities readily accessible to U.S. citizens who must work as nonresidents in neighboring states in order to make a living. The principle of *Maxwell* that extraterritorial values may be used to determine the rate of tax was formulated in connection with a *privilege death* tax in a different historical setting. *Maxwell* was decided 77 years ago. As evidenced by the ongoing controversy and litigation in the courts, *Maxwell* did not address or resolve the Due Process issue raised by this Petition. It did not address or resolve the issue whether a state's indirect tax on a nonresident taxpayer's extraterritorial income from a source having no nexus with the State violates Due Process.

Accordingly, Certiorari should be granted. The Court's holding in *Maxwell* should be reconsidered in light of the changed historical times and circumstances in which it is being implemented. Section 2362 of the Oklahoma Tax Code should be declared unconstitutional.

REASONS FOR GRANTING THE PETITION

The Petition for a Writ of Certiorari in this case should be granted for two reasons, one specifically set forth in Rule 10(c) of the Rules of the United States Supreme Court, because the Oklahoma Court of Appeals (and several state courts of last resort) and the United States Court of Appeals for the Tenth Circuit have "decided an important question of federal law that has not been, but should be, settled by this Court". Sup.Ct.R. 10(c). In addition, because of the "con-

tinuing source of controversy and litigation in both state and federal courts" regarding the specific extraterritorial state income taxation problem raised in this Petition, and not addressed by the holding in *Maxwell*, Certiorari should be granted. This Court should reconsider its holding in *Maxwell* under the current circumstances. *See, e.g., Gideon v. Wainwright*, 372 U.S. 335, 337-38 n.2 (1963); Robert L. Stern *et al., Supreme Court Practice* 209 (7th ed. 1993).

A. The Opinion Below, The Decisions Of Other State Courts of Last Resort, And The Decision Of United States Court Of Appeals For The Tenth Circuit, Decided An Important Question Of Federal Law That Has Not Been, But Should Be, Settled By This Court

Establishing the existence of grounds to invoke this reason to grant Certiorari are five recent decisions of courts of last resort of States other than Oklahoma, specifically, the State of Missouri, the State of New York, the State of Main, the State of North Carolina, and the State of Vermont; and, a decision by the United States Court of Appeals for the Tenth Circuit. In *Matteson v. Director of Revenue, State of Missouri*, 909 S.W.2d 356, 358-59 (Mo. 1995); *Brady v. New York*, 607 N.E.2d 1060 (N.Y. Ct. App. 1992), *cert. denied*, 113 S.Ct. 2998 (1993); *Stevens v. State Tax Assessor*, 571 A.2d 1195, 1197 (Me. 1990), *cert. denied*, 498 U.S. 819 (1990); *Aronov v. Secretary of Revenue*, 371 S.E.2d 468, 471 (N.C. 1988), *cert. denied*, 489 U.S. 1096 (1989); and, *Wheeler v. State*, 249 A.2d 887, 891 (Vt. 1969), *appeal dismissed*, 396 U.S. 4 (1969), a state court of last resort adopted the formalistic approach to decision-making used by the majority in *Maxwell* and rejected nonresident challenges under the federal constitution to state income taxation schemes similar to Section 2362. Similarly, the United States Court of Appeals for the Tenth Circuit relied upon the majority holding in *Maxwell* to conclude that "the mere inclusion of military compensation in a formula determining the rate of tax on income from Kansas sources does not constitute a tax on the military income of a

nonresident individual." *United States v. Kansas*, 810 F.2d 935, 938 (10th Cir. 1987).

Each court relied upon *Maxwell* and upheld under due process the State's inclusion of nonresidents' total income, wherever earned, including extraterritorial income from a source having no nexus with the taxing jurisdiction, to determine the nonresident taxpayer's state income tax liability.

The majority of the *Maxwell* Court avoided the Due Process challenge by adhering to the type of formalism which was acceptable in 1919. The *Maxwell* majority held that the New Jersey inheritance statute "merely affords a measure of the tax imposed". *Maxwell*, 250 U.S. at 539.

Maxwell, however, was decided in the specific context of a *privilege death tax*. The separate and distinct problem of a State using a nonresident's extraterritorial *income* from a source with *no nexus* to either the taxing jurisdiction or its benefits and protections to determine the *state income tax liability of the nonresident* was not addressed. This specific issue has not been, but should be, settled by this Court.

For example, the court below in *Walters II* stated without analysis:

> "Quite simply, § 27 of S.B. 1121 is not an impermissible attempt to extend the jurisdiction of Oklahoma's taxing authority beyond its borders. *Use of out-of-state income to calculate a tax rate for in-state income in no way represents a tax on the out-of-state income.*"

Walters II, 935 P.2d at 402 (emphasis added), reproduced at App. 7a-8a. The Court rejected the formalism approach to decision-making used by the *Maxwell* majority in *Wisconsin v. J.C. Penney Co.*, 311 U.S. 435, 443-44 (1940), and replaced it with a "practical operation" and effect approach.

It is well-settled that states have the power to tax *all* the income of its residents, even income earned beyond the borders of the State. *Oklahoma Tax Comm'n v. Chickasaw*

Nation, 115 S.Ct. 2214, 2222 (1995) (*citing New York ex rel. Cohn v. Graves*, 300 U.S. 308, 312-313, 57 S.Ct. 466, 467-468, 81 L.Ed. 666 (1937)). However, a taxing jurisdiction such as Oklahoma is more limited in its power to tax the income of nonresidents and must tax only the income derived from sources within the borders of the State. *Id.* at 2222 n.11; *Travis v. Yale and Towne Mfg. Co.*, 252 U.S. 60, 75, 40 S.Ct. 228, 230, 64 L.Ed. 460 (1919); *Shaffer v. Carter*, 252 U.S. 37, 57, 40 S.Ct. 221, 227, 64 L.Ed. 445 (1919).

In *Shaffer*, for example, the Court stated:

> "as to nonresidents, the jurisdiction extends only to their property owned within the state and their business, trade, or profession carried on therein, and the tax is only on such income as is derived from those sources."

Shaffer, 252 U.S. at 57.

One commentator has observed that the United States Supreme Court has not specifically addressed "whether the fundamental considerations underlying the limitations on a state's jurisdiction to tax a nonresident's income should be translated into corresponding limitations on a state's tax rate structure. *See* Hellerstein, *supra*, 72 Mich.L.Rev. at 1318. The Court, however, recently addressed a similar apportionment issue in the context of multi-state corporations and their "unitary business" income. *See Allied-Signal, Inc. v. Director, Division of Taxes*, 112 S.Ct. 2251 (1992) (*rejecting* a formalistic approach to decision-making and noting that "the State's power to tax an individual's or corporation's activities is justified by the 'protection, opportunities and benefits' the State confers on those activities."). The economic reality for many nonresident taxpayers affected by Section 2362 of the Oklahoma Tax Code regarding the ultimate exaction, or tax, is more money out-of-pocket. *See* App. at 15a (opinion of Oklahoma Supreme Court Justice, Hodges, J., dissenting from Oklahoma Supreme Court denial of certiorari).

Because the United States Supreme Court has never addressed whether the Due Process Clause bars a state from including in a progressive income taxation scheme the extra-territorial income of nonresidents in the calculation of the nonresident's State income tax liability, and several state courts have recently relied on the holding in *Maxwell* to decide this important federal question in the affirmative, Certiorari should be granted and Section 2362 should be declared unconstitutional.

B. The Problem Of A State's Inclusion Of A Nonresident's Out-of-State Income To Calculate The State Income Tax Rate For The Nonresident's In-State Income Tax Liability Has Been A Continuing Source Of Controversy And Litigation In Both State And Federal Courts.

Establishing the existence of grounds to invoke this reason to grant Certiorari is this Court's decision in *Gideon v. Wainwright*, 371 U.S. 335 (1963). In *Gideon*, this Court granted certiorari to review a case that involved an unresolved problem, a defendant's federal constitutional right to counsel in a state court, *Betts v. Brady*, 316 U.S. 455 (1942). Although the specific issue raised in this Petition is vastly different from the issue in *Gideon*, the circumstances regarding the Court's grant of certiorari are similar.

As in this case, the issue presented to the Court in *Gideon* had been a continuing source of controversy and litigation in both state and federal courts. Similarly, the issue presented by Gideon had sparked scholarly commentary. *See Gideon*, 371 U.S. at 338 n.2.

Petitioners currently ask this Court to reconsider *Maxwell v. Bugbee*, 250 U.S. 525 (1919), a split decision decided in 1919. In *Gideon,* this Court reconsidered a prior split decision involving a reoccurring, yet unresolved issue. *Betts* had been decided 21 years prior to *Gideon*. Like *Maxwell*, *Betts* was a divided opinion. Like *Maxwell*, *Betts* had been decided many

years prior to the case before the Court. As in *Maxwell*, *Betts* had not resolved the specific problem raised by the Petitioner. The Court in *Gideon* granted certiorari "[t]o give this problem another review". *Id.*

Accordingly, this Petition for Writ of Certiorari should be granted and *Maxwell* should be reconsidered.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Dated: July 2, 1997.

Respectfully submitted,

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APPENDIX

COURT OF APPEALS OF OKLAHOMA
DIVISION NO. 1.

No. 85148
Aug. 23, 1996.
Rehearing Denied Nov. 4, 1996.
Certiorari Denied March 5, 1997.

DAVID WALTERS, Governor of the State of Oklahoma and Ken Feagins, a non-resident individual,

Appellants,

—v.—

STATE OF OKLAHOMA *ex rel.*, OKLAHOMA TAX COMMISSION,

Appellee.

Appeal from the District Court of Oklahoma County; Honorable Leamon Freeman, District Judge.

AFFIRMED.

Stanley M. Ward, Norman, Ken Feagins, Dallas, Texas; Duchess Bartmess, Oklahoma City for Appellants.

Stanley Johnston, Robert B. Struble, Oklahoma City, for Appellee.

MEMORANDUM AND OPINION

CARL B. JONES, Presiding Judge:

Appellants brought this declaratory judgment action against the Oklahoma Tax Commission [the Commission] challenging the constitutionality of Senate Bill No. 1121 [S.B. 1121], which was enacted by the Oklahoma Legislature in 1994. On cross-motions for summary judgment, the trial court rendered judgment for Appellee, and Appellants appeal.

S.B. 1121, among other things, changed the method of calculating state income tax for nonresident and part-year resident individuals. Okla.Sess.Laws 1994, ch. 278, § 27, *see now* 68 O.S.Supp.1994 § 2362.[1] Prior to amendment, § 2362 pro-

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[1] S.B. 1121 amended 68 O.S. § 2362 to read as in pertinent part:

"For tax year beginning on or after January 1, 1994, the Oklahoma taxable income of a part-year resident individual, nonresident individual, a nonresident trust and a nonresident estate shall be calculated . . . as if all income were earned in Oklahoma.

"Using Oklahoma income tax rates, part-year resident individuals, nonresident individuals, nonresident trusts and nonresident estates shall compute their tax liability on the amount computed in the preceding paragraph.

"From the liability computed there shall be deducted all allowable credits to determine the amount of tax due.

"Part-year resident individuals, nonresident individuals, nonresident trusts and nonresident estates shall divide adjusted gross income from Oklahoma sources by the adjusted gross income from all sources to arrive at the applicable percentage that Oklahoma adjusted gross income represents of all adjusted income received by the taxpayer in the income year.

"Part-year resident individuals, nonresident individuals, nonresident trusts and nonresident estates shall multiply the amount of Oklahoma tax computed by the applicable percentage calculated in the preceding paragraph in order to determine the amount of income tax which must be paid to the State of Oklahoma. Nothing in this section shall be construed to allow for greater than one hundred percent (100%) of a taxpayer's income to be taxed.

* * *

vided that the taxable income of a nonresident individual, trust, or estate, "shall be the same as if he were a resident individual [etc.]," and established a system by which the taxpayer's adjusted gross income as reported to the federal government was excludable from state taxable income *unless* the income was attributable to ownership of property, conduct of a business, trade, or profession, or other business or property in this state. Income from sources outside Oklahoma was not included in a nonresident's taxable income. S.B. 1121 modified existing law by requiring nonresident and part-time residents to apply the Oklahoma tax rate applicable to their adjusted gross income from all sources (not just income earned in Oklahoma) and calculate their tax liability as if paying Oklahoma income tax on all such taxable income, prorated according to the percentage the Oklahoma taxable income bears to the adjusted gross income from all sources.

The Commission describes the amendment as one which created "tax equity," assuring that nonresidents and part-year residents pay tax on their Oklahoma income based on the rate determined by their total taxable income, just as full-time Oklahoma residents do. Appellants contend that S.B. 1121 was a "revenue bill," and so is unconstitutional because it was enacted contrary to the requirements of Okla. Const., Art. V, § 33.[2] Appellants also contend the bill is invalid under the state

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[2] Section 33, as amended by State Question No. 640 in 1992, provides,

> "A. All bills for raising revenue shall originate in the House of Representatives. The Senate may propose amendments to revenue bills.
>
> "B No revenue bill shall be passed during the last five days of the session.
>
> "C. Any revenue bill originating in the House of Representatives shall not become effective until it has been referred to the people of the state at the next general election held throughout the state and shall become effective and be in force when it has been approved by a majority of the votes cast on the measure at such election and not otherwise, except as otherwise provided in subsection D of this section.

(footnote continued)

Constitution because it embraces more than one subject. Okla. Const., Art. V, § 57. In addition, Appellants raise equal protection, due process, and Commerce Clause objections to the bill under the state and federal constitutions.

This appeal is brought under the accelerated procedures of Rule 1.203(A), Rules of Appellate Procedure in Civil Cases, 12 O.S. 1993 Supp. Ch. 15, App. 2. Summary judgment will be affirmed if the record reveals no substantial controversy as to any material fact, and that one party is entitled to judgment, as a matter of law. *See Johnson v. Mid-South Sports*, 806 P.2d 1107, 1108 (Okla.1991). Our review is limited to the record and issues actually presented to the trial court. *Hughey v. Grand River Dam Auth.*, 897 P.2d 1138, 1143 (Okla.1995).

In our review of the trial court judgment we must be guided also by the strong presumption that legislative enactments are constitutional. *Black v. Ball Janitorial Service, Inc.*, 730 P.2d 510, 512 (Okla.1986); *Reherman v. Oklahoma Water Resources Bd.*, 679 P.2d 1296, 1300 (Okla.1984). A legislative act will be upheld against constitutional challenge unless it is clearly, palpably, and plainly inconsistent with our fundamental law *Reherman*, 679 P.2d at 1300. Any question of constitutionality, even in a close case, will be resolved in favor of validity of the legislation. *Leveridge v. Oklahoma Tax Comm'n.*, 294 P.2d 809, 811 (Okla.1956).

At the outset, we reject the Commission's argument that Appellant Walters lacks standing to press a request for declaratory relief in this case. We concede that Walters, as a full-time Oklahoma resident, has no direct interest in the effects of S.B.

"D. Any revenue bill originating in the House of Representatives may become law without being submitted to a vote of the people of the state if such bill receives the approval of three fourths (3/4) of the membership of the House of Representatives and three-fourths (3/4) of the membership of the Senate and is submitted to the Governor for appropriate action. Any such revenue bill shall not be subject to the emergency measure provision authorized in [Art. V, § 58] and shall not become effective and be in force until ninety days after it has been approved by the Legislature, and acted on by the Governor."

1121 on nonresidents and part-year residents. We find, however, that Walters (whose veto of the bill was overridden) has standing to question whether the bill passes constitutional muster under the one-subject rule in Art. V, § 57. The affidavit of the Governor states that the interests of the state are involved in that the bill is harmful to the interest of the state in attracting new out-of-state business. In this summary judgment proceeding that statement suffices to supply standing in that under the statute, the state's interest is squarely brought before the court. Feagins has standing to press the claim for relief in all respects, and we will not burden this opinion with an extended discussion of the nuances of standing.

The accepted test for a "revenue bill" is the two-pronged analysis stated by the court in *Leveridge*: A revenue bill is one whose principal purpose is to increase state tax revenue *and* which levies a tax in the strict sense. *Leveridge*, 294 P.2d at 811; *see Board of County Comm'rs v. Oklahoma Pub. Empl. Retirement Sys.*, 405 P.2d 68, 72–73 (Okla.1965).[3] The term "has been confined to bills to levy taxes in the strict sense of the words, and has not been understood to extend to bills for other purposes, which may incidentally create revenue." *The Nashville*, 17 Fed.Cas. 1176, 1178 (No. 10,023) (D.Ind.1868), quoted in *Anderson v. Ritterbusch*, 22 Okla. 761, 98 P. 1002, 1006 (1908).

Appellants argue that S.B. 1121 satisfies both prongs of the revenue bill test. The Commission estimated that § 27 of the bill would raise approximately $18 million dollars in revenue, the bulk of which would go into the general revenue fund. For the most part, however, the sections of S.B. 1121 were predicted to be revenue-neutral. In fact, the Commission's impact statements showed that two sections of the bill would have a *negative* impact on revenue. Moreover, § 27 would not uniformly increase state taxes for all nonresidents and part-year

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[3] *See, generally*, Ramsey, *What is a "Revenue Bill" Within the Meaning of Our Most Recent Constitutional Amendment*, 63 Okla.B.J. 1567 (1992), discussing the subject following passage of State Question No. 640.

residents. If a taxpayer had losses from out-of-state business (which would reduce federal adjusted gross income), the Commission projected that § 27 would actually result in a decrease in state tax.

It appears, then, that the Commission is correct to characterize S.B. 1121 as merely a change in the way the tax laws are administered. The bill's principal object is not to raise revenue, and it does not levy a tax in the strict sense. That it has the incidental effect of increasing general revenues does not mean make it a revenue bill. The trial court correctly rejected the challenge to S.B. 1121 under Art. V, § 33.

Appellants argue S.B. 1121 is void under Art. V, § 57[4] because it relates, according to its title, to several different subjects: "revenue and taxation, debtor and creditor, intoxicating liquors, motor vehicles and soldiers and sailors." Appellants assert there is no overarching purpose or theme to the divers provisions in the bill. The Commission asserts the common theme of the bill's provisions is administration of the state tax laws.

The purpose of § 57 is to prevent legislative "log-rolling—the enactment of legislation through the combination of unpopular causes with popular legislation on an entirely different subject." *Campbell v. White*, 856 P.2d 255, 258 (Okla.1993); *Bond v. Phelps*, 200 Okla. 70, 191 P.2d 938, 950 (1948); and "veto-proofing" a bill by attachment of a popular rider to an otherwise unpopular bill. *See Johnson v. Walters*, 819 P.2d 694, 697 (Okla.1991). If the bill's provisions are "germane, relative and cognate" to the subject expressed in the title, then the bill satisfies the mandate of § 57. *See Black v. Oklahoma Funding Bond Comm'n*, 193 Okla. 1, 140 P.2d 740, 743 (1943); *Campbell*, 856 P.2d at 260.

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[4] "Every act of the Legislature shall embrace but one subject, which shall be clearly expressed in its title, except general appropriation bills, general revenue bills, and bills adopting a code, digest, or revision of statues . . . Provided, That if any subject be embraced in any act contrary to the provisions of this section, such act shall be void only as to so much of the law as may not be expressed in the title thereof."

The proper construction to be given to the one-subject rule seems to have narrowed somewhat in recent years. *See Campbell*, 856 P.2d at 258-60; and *Johnson*, at 699 (Wilson, J., concurring) (suggesting that strict compliance with § 57 would be required thereafter). In this case, we agree with the trial court that "[e]very provision of the Act in some way deals with enforcement of the tax laws of Oklahoma or provides for a method of reporting or for provisions to be placed on tax forms as the method for donating funds to the State." Appellants have failed to point out any section of the bill which does not relate to the general subject of tax administration: tax liens; filing of a bond with the Commission by persons in liquor business; inspection and registration of vehicles by the Commission or its motor license agents; confidentiality of tax information; approval of bond in lieu of payment of disputed taxes; tax refund claims; estate tax returns and audits; tax exemptions; tax code changes; and the like all relate to the state tax laws and their administration. We hold that S.B. 1121 does not violate the one-subject rule of Art. V, § 57.

Appellants' various other constitutional challenges to S.B. 1121 are based on their contention that § 27 of the bill imposes an indirect tax on income derived outside of the state. The Commission properly responds that § 27 does not impose a tax on such out-of-state income, but merely uses that income in calculating the rate at which Oklahoma-derived income shall be taxed. With that understanding of § 27 in mind, some of Appellants' constitutional arguments are clearly without merit. Appellants claim a due process violation under Okla. Const., Art. II, §§ 2 and 7, and the Fourteenth Amendment to the U.S. Constitution, but they have failed to establish the necessary factual predicate to assert such a claim, because their out-of-state income is not being taxed. The bill does not offend the privileges and immunities clause of the U.S. Constitution, Art. IV, § 2, cl. 1, by taxing the property of persons who are not represented in the Legislature. Quite simply, § 27 of S.B. 1121 is not an impermissible attempt to extend the jurisdiction of Oklahoma's taxing authority beyond its borders. Use of out-of-state

income to calculate a tax rate for in-state income in no way represents a tax on the out-of-state income. *See Brady v. State*, 80 N.Y.2d 596, 592 N.Y.S.2d 955, 958, 607 N.E.2d 1060, 1063 (Ct.App.1992), *cert. denied*, 509 U.S. 905, 113 S.Ct. 2998, 125 L.Ed.2d 692 (1993); *cf.*, *Maxwell v. Bugbee*, 250 U.S. 525, 539, 40 S.Ct. 2, 6, 63 L.Ed. 1124 (1919) (inclusion of entire estate of decedent to calculate inheritance tax rate for property in New Jersey "is in no just sense a tax upon the foreign property.").

Similarly, Appellants' claim that nonresidents and part-year residents are denied equal protection of the laws, in violation of those same constitutional provisions, lacks a factual basis because Appellants have failed to show how they are members of a class which has been treated differently. Appellants are treated no differently than other nonresidents or part-year residents, and the method for determining tax rates based on a taxpayer's total income is not different for nonresidents or part-year residents from the method used for full-time Oklahoma residents.

Appellants' final constitutional attack on S.B. 1121 asserts that it unfairly erects a barrier to interstate commerce in violation of the Commerce Clause of the U.S. Constitution, Art. I, § 8, cl. 3. Appellants claim the bill places an arbitrary and discriminatory tax burden on foreign income of nonresidents and part-year residents. As we have just observed, however, the bill does not tax foreign income. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 97 S.Ct. 1076, 51 L.Ed.2d 326 (1977), cited by Appellants, is inapposite to the situation presented here. In *Complete Auto Transit*, a motor carrier transporting cars in Mississippi for General Motors brought a Commerce Clause challenge to a "privilege tax" levied by the State of Mississippi. (The Court rejected its challenge.) S.B. 1121 does not purport to tax interstate commerce.

Having reviewed the record and the briefs of the parties, this Court finds that the trial court judgment must be AFFIRMED.

GARRETT and JOPLIN, JJ., concur.

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

CJ-94-4997-64
Jan. 30, 1995 P 1:42

DAVID WALTERS and KEN FEAGINS,

Plaintiffs,

—vs—

STATE OF OKLAHOMA *ex rel.*,
OKLAHOMA TAX COMMISSION,

Defendant.

JUDGMENT

On this *26* day of *January, 1995,* the Court having read the extensive briefs submitted by both parties including a review of case law and the Oklahoma Constitution and finds:

This litigation involves Senate Bill 1121 ("Bill") passed by the Oklahoma Legislature during the waning days of the 1994 session. The part of the bill complained of herein is that part dealing with changing the method of calculating Oklahoma Income Taxes levied against non-resident or part-time residents of Oklahoma who have earnings from within Oklahoma for work or services performed in Oklahoma. The challenges raised shall be treated separately.

The first issue to be addressed is whether this bill is a Revenue Bill within the meaning of Article V, Section 33, Sections A, B, C and D. Section A requires that all bills for raising revenue shall originate in the House of Representatives. Section B prohibits the passage of a Revenue Bill during the last five days of the session. Section C requires Revenue Bill passed be submitted to a vote of the people before it can become effective unless under Section D it receives an approval by at least 3/4 vote of both houses of the legislature.

The Court answers the question, as to whether the ("Bill") is a Revenue Bill, in the negative.

The principal object of the ("Bill") complained of herein is the equalization of income taxes between residents and non-residents or part-time residents. Any revenue which might be raised by this ("Bill") would be raised incidentally and the ("Bill") does not levy a tax nor have as its principal object to raise revenue.

Our Supreme Court in Leveridge vs Oklahoma Tax Commission 245 P2d 811 stated that a bill which does not within its four corners levy a tax is not per se a revenue bill. Leveridge involved the removal of an exemption which then subjected property to taxation which had not previously been taxed. This case is closely analogous to Leveridge. The ("Bill") at Bar does not levy a tax but instead changes the method of calculation of income taxes.

Since this Court has determined the ("Bill") is not a revenue raising bill the remaining challenges based upon Article V, Section 33 of the Oklahoma Constitution are without merit and are rejected.

Plaintiff's Proposition Three asserts Senate Bill 1121 addresses more than one subject and thus is violative of Article V, Section 57 of the Oklahoma Constitution.

This proposition of the plaintiff upon careful study of the Act must also be rejected. While this Court at first blush thought the title to be somewhat confusing nevertheless upon careful scrutiny found there to be a common scheme which is

the test to be applied. Every provision of the Act in some way deals with the enforcement of the tax laws of Oklahoma or provides for a method of reporting or for provisions to be placed on tax forms as the method for donating funds to the State. The Court does not find this to be repugnant to Article V, Section 57 of the Oklahoma Constitution.

Plaintiffs next proposition challenges Senate Bill 1121 as Violative of Article II, Sections 2 and 7 of the Oklahoma Constitution.

This proposition must fail as there is no prevention of a persons having the inherent right to life, liberty, pursuit of happiness and the enjoyment of the gains of their own industry, nor does it deprive the plaintiffs of life, liberty or property without due process of law. Senate Bill 1121 is constitutionally acceptable.

The United States Supreme Court has on many occasions upheld the validity of taxing scheme which includes the inclusion of property which is not subject to taxation as a measure of tax imposed on property within the State.

This bill does not tax out-of-state income but merely establishes a method where those non-residents or part-time residents are treated equally with residents and do not receive in the future a tax break not afforded to our residents.

Neither does it violate the Constitution of the United States nor is it repugnant to the Constitution.

It is therefore the Order of this Court that the Plaintiffs Motion for Summary Judgement be and is Denied.

It is further ordered that Defendants Motion for Summary Judgement is sustained and Judgment is entered in favor of the Defendant.

/s/ LEAMON FREEMAN
Leamon Freeman
District Judge

Certificate of Mailing

A Copy of this order was mailed this __ day of January, 1995 to:

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IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

Wednesday, March 5, 1997

THE CLERK IS DIRECTED TO ISSUE THE FOLLOWING ORDERS:

85,148 David Walters, Governor of the State of Oklahoma and Ken Feagins, a nonresident individual v. State of Okalhoma ex rel. Oklahoma Tax Commission. Certiorari denied.

CONCUR: Kauger, C.J., Lavender, Simms, Hargrave, Wilson, JJ., Lumpkin, S.J. (sitting in lieu of Watt, J. who certified his disqualification).

DISSENT: Summers, V.C.J., Hodges, J. (separate writing), J. Opala, J., dissenting.

I would grant certiorari to assess the impact of Art. 5, § 33(c) and (d) on this court's opinion in Leveridge v. Oklahoma Tax Commission, 294 P.2d 809 (Okla. 1956).

/s/ YVONNE KAUGER
Chief Justice

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

No. 85,148
Filed
March 5, 1997

DAVID WALTERS, Governor of the State of Oklahoma, and KEN FEAGINS, a nonresident individual,

Appellants,

—vs—

STATE OF OKLAHOMA, *ex rel.* OKLAHOMA TAX COMMISSION,

Appellee.

HODGES, J., dissenting from denial of certiorari:

I would grant certiorari to address the constitutionally Senate Bill 1121 in light of the approval of Initiative Petition Number 348 amending section 33 of article 5 of the Oklahoma Constitution.

In 1992, the people of Oklahoma approved Initiative Petition Number 348, which amended section 33 of article 5 of the Oklahoma Constitution, to require all revenue raising bills to be approved by a majority of the people at the next general election or by a three-fourths vote of each house of the Oklahoma Legislature. Okla. Const. art. 5, § 33; *see In re Initiative Petition No. 348*, 820 P.2d 772,774 (Okla. 1991). The ballot title reflects the intent of the people of Oklahoma to

require *any revenue raising bill* to be approved in the manner mandated by the Initiative Petition.

The Oklahoma Tax Commission has estimated that Senate Bill 1121 (codified at Okla. Stat. tit. 68, § 2362 (Supp. 1994)) would raise approximate $18 million dollars in revenue, most of which would go into the general fund. The effect of Senate Bill 1121 is to increase the taxes of a significant number of nonresidents and part-time residents. Nonetheless, the Court of Civil Appeals found that Senate Bill 1121 did not violate article 5, section 33, even though it did not go to a vote of the people and did not receive three-fourths vote of each House.

The Oklahoma Legislature attempts to circumvent the constitutional limits on its power by couching the bill's purpose as revenue-neutral even though it is raises an estimated $18 million in taxes. The Legislature cannot do indirectly that which is otherwise prohibited. *Lepak v. McClain*, 844 P.2d 852, 854 n. 11 (Okla. 1992). In *Trapp v. Cook Construction Company*, 105 P. 667, 671 (Okla. 1909), this Court stated: "[A]n act in evasion of the terms of the Constitution . . . frustrating its general and clearly expressed or necessarily implied purpose is clearly void as if in express terms forbidden. . . ."

When the people of Oklahoma approved Initiative Petition 348, they clearly intended to limit the Oklahoma Legislature's power to enact "any revenue raising bill." *In re Initiative Petition No. 348*, 820 P.2d at 778 (Okla. 1991). Senate Bill 1121 frustrates this intent and is void. By allowing Senate Bill 1121 to stand, this Court is allowing the Oklahoma Legislature to do indirectly what it is constitutionally prohibited from doing directly.

Supreme Court, U.S.
FILED
JUL 29 1997
CLERK

(2)

No. 97-55

In the
Supreme Court of the United States
October Term, 1997

FRANK KEATING, GOVERNOR, OF THE STATE OF OKLAHOMA AND KEN FEAGINS, A NONRESIDENT INDIVIDUAL,

Petitioners,

v.

STATE OF OKLAHOMA, EX REL., OKLAHOMA TAX COMMISSION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF OKLAHOMA-DIVISION NO. 1

BRIEF IN OPPOSITION

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16 pp

Like the Federal government and many of its sister states, Oklahoma has a progressive income tax system under which the taxes paid by an individual is based, to some extent, upon the individual's ability to pay. Oklahoma like its sister states only taxes the income earned within the state. Petitioner in this case has raised the following question related to Oklahoma's progressive income tax system:

QUESTION PRESENTED

Does a state law for taxation of income of a nonresident, which only taxes income earned from within the state, violate the Due Process Clause when the state law applies the same income tax calculation, taking into account all federally recognized deductions and exemptions to residents and nonresidents alike and then allow the nonresident to apply the rate so calculated to only that income earned within the state?

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2. THERE IS NO CONFLICT AMONG THE STATE OR FEDERAL COURTS ON PETITIONER'S ISSUE. THE SEVERAL STATE COURTS AND ONE FEDERAL COURT THAT HAVE REVIEWED PETITIONER'S ISSUE HAVE ALL FOLLOWED THIS COURT'S PRECEDENT. 3

3. OKLAHOMA'S TAXING LAW IS CONSTITUTIONALLY PERMISSIBLE UNDER THIS COURT'S PRECEDENT. . . . 3

a. Oklahoma's Progressive Income Tax Law is constitutionally permissible. 3

b. Oklahoma's amendment is constitutionally permissible under this Court's precedent. 5

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c. Over the past twenty-six (26) years only six courts have been called on to decide the issue presented by Petitioner in this case. In each and every case the courts have followed the settled federal law. 7

d. The issue in the present case has not been a continuing source of controversy and litigation in both state and federal courts. Accordingly courts do not need guidance in this area. 8

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No. 97-55

In the
Supreme Court of the United States
October Term, 1997

FRANK KEATING, GOVERNOR, OF THE STATE OF OKLAHOMA AND KEN FEAGINS, A NONRESIDENT INDIVIDUAL,

Petitioners,

v.

STATE OF OKLAHOMA, EX REL., OKLAHOMA TAX COMMISSION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF OKLAHOMA-DIVISION NO. 1

BRIEF IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals of the State of Oklahoma Division No. 1 of which Petitioners seek review, was rendered sub nomine ***David Walters v. State of Oklahoma, ex rel., Oklahoma Tax Commission*** and is reported at 935 P.2d 398 (Okla. Ct. App. 1996).

STATEMENT OF THE CASE

Petitioner (Plaintiff below) initially brought this action in state district court raising several state and federal constitutional claims. Petitioner sought declaratory relief that Section 27 of Senate Bill 1121, Okla. Stat. tit. 68 § 2362 (1994), of the 1994 Oklahoma Legislative Session which amended Section 2362 of the Oklahoma Income Tax Code was unconstitutional, both as to its enactment and the effect of the law. Petitioner here seeks only review pursuant to the Due Process Clause.

On cross-motions for summary judgment, the trial court rendered judgment for Respondent (State) on all counts.

On appeal, the Court of Appeals of the State of Oklahoma Division No. 1 affirmed the trial court's judgment for State on all counts. Petitioner sought review of the Court of Appeals decision by the Oklahoma Supreme Court by a petition for writ of certiorari. The Oklahoma Supreme Court denied Petitioner's petition for writ of certiorari.

Petitioner has conceded two (2) important points in his petition before this Court:

1. Under Okla. Stat. tit. 68 § 2362 (1994) a nonresident's tax liability is based upon the percentage of their income earned in Oklahoma. (See Petitioner's Petition for Writ of Certiorari, page 5.)

2. Okla. Stat. tit. 68 § 2362 (1994) not only caused some nonresident's Oklahoma tax liability to increase but also caused some nonresident's Oklahoma tax liability to decrease. (See Petitioner's Petition for Writ of Certiorari, page 5.)

As will be shown, the decision of the trial court and the Court of Appeals are consistent with applicable decisions of this Court,

and do not conflict with any federal law or with the applicable decisions of the highest courts of other states. Review by certiorari is unwarranted, and should be denied.[1]

REASONS FOR DENYING THE WRIT

PETITIONER'S WRIT SHOULD BE DENIED BECAUSE:

1. THE ISSUE PRESENTED BY PETITIONER HAS BEEN SETTLED BY THIS COURT.

2. THERE IS NO CONFLICT AMONG THE STATE OR FEDERAL COURTS ON PETITIONER'S ISSUE. THE SEVERAL STATE COURTS AND ONE FEDERAL COURT THAT HAVE REVIEWED PETITIONER'S ISSUE HAVE ALL FOLLOWED THIS COURT'S PRECEDENT.

3. OKLAHOMA'S TAXING LAW IS CONSTITUTIONALLY PERMISSIBLE UNDER THIS COURT'S PRECEDENT.

a. Oklahoma's Progressive Income Tax Law is constitutionally permissible.

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[1] This Court recently granted certiorari in a case in which nonresidents of New York are not allowed to deduct a proportionate share of their federal alimony deduction for New York state income tax purposes, ***Lunding v Appeals Tribunal***, 89 N.Y.2d 283, 675 N.E.2d 816, 653 N.Y.S.2d 62 (1996). The Oklahoma nonresident income tax statute is markedly different from the New York nonresident income tax code. **Under Oklahoma law a nonresident is allowed to take a prorated share of their federally allowed deductions based upon the percentage their Oklahoma income is to their total Federal income.**

Like the Federal government and many of its sister states, Oklahoma has a progressive income tax system under which the taxes paid by an individual is based, to some extent, upon the individual's ability to pay. Under a progressive system, the taxes paid by an individual increase as the individual's income increases. Thus, under a progressive tax system, the tax rate of an individual who makes $50,000.00 a year is higher than that of a citizen who makes $5,000.00.

The challenged tax law, Okla. Stat. tit. 68 § 2362 (1994), corrected an inequity in Oklahoma's progressive income tax system -- an inequity under which nonresidents were afforded preferential treatment. Under the preferential system, the out of state income of nonresidents was virtually ignored in calculating the tax rate on Oklahoma income.

For example, under the prior tax law, a nonresident taxpayer with an income of $50,000.00, who earned $1,000.00 in Oklahoma, would have his tax liability calculated under a system that would presume his total income (his total ability to pay) was $1,000.00. Theoretically, under such a system, if all fifty states had similar income tax rates, an individual who earned $50,000.00 a year -- $1,000.00 in each state -- would have little or no state income tax liability at all.

To correct the inequity in the progressive tax system that existed because of the preferential treatment of nonresidents, the Legislature modified the method of computing Oklahoma income taxes for nonresidents by determining the Oklahoma tax rate on the basis of the total income, and then applying it to the percentage of their total income earned in Oklahoma. The amendment, designed to bring more equity to Oklahoma's progressive income tax system, insured that nonresidents, like resident taxpayers, have the taxes on their Oklahoma income calculated on the basis, to some extent, of their ability to pay. The amendment

also insured that Oklahoma only taxed income earned in Oklahoma – no out of state income is taxed by Oklahoma.

All taxpayers are now treated equally.

Under the amendment, the tax paid on Oklahoma income by both (a) residents and (b) nonresidents is calculated using the same formula:

(1) The tax rate for both is based upon the taxpayer's total income.

(2) The tax liability for both is based upon the percentage of their income earned in Oklahoma.

b. Oklahoma's amendment is constitutionally permissible under this Court's precedent.

The gravamen of Petitioners complaint is that the Oklahoma progressive tax rate - not tax liability - considers taxpayers total income (ability to pay). The appropriateness of a progressive tax rate has been well established by this Court. See ***Brushaber v. Union Pac. R.R.***, 240 U.S. 1, 36 S.Ct. 236, 60 L.Ed. 493 (1915).

The inclusion in a state taxing scheme of property not subject to direct taxation by the state, for the purpose of determining the **rate of taxation** to be applied to property that is subject to the state's taxing power, is constitutionally permissible. ***Atlantic and Pac. Tea Co. v. Gorsjean***, 301 U.S. 412, 57 S.Ct. 772, 81 L.Ed. 1193 (1937); ***Maxwell v. Bugbee***, 250 U.S. 525, 40 S.Ct. 2, 63 L.Ed 1124 (1919). In ***Maxwell*** this Court reviewed a New Jersey inheritance tax that required the inclusion of the entire estate of the decedent, wherever the property was located, to determine the rate by which the New Jersey property would be taxed. The New Jersey inheritance tax was calculated, as is done by Section 27 of

Senate Bill 1121, by applying the rate applicable to the entire estate, including property located outside of New Jersey, but then reducing the tax to reflect only the percentage of the estate located in New Jersey. This Court in ***Maxwell*** held that:

> "[T]he subject-matter here regulated is a privilege to succeed to property which is within the jurisdiction of the State. When the State levies taxes within its authority, property not in itself taxable by the State may be used as a measure of the tax imposed * * * In the present case the State imposes a privilege tax, clearly within its authority, and it has adopted as a measure of that tax the proportion which the specified local property bears to the entire estate of the decedent * * * It is in no just sense a tax upon the foreign property." (*Id.*, at 539, 40 S.Ct. at 6.) (Emphasis added.)

Since this Court's decision in ***Maxwell*** and ***Grosjean***, every high court in the states that have considered Petitioner's issue have upheld their state's tax treatment of nonresident income. See ***Matteson v. Director of Revenue, State of Missouri***, 909 S.W.2d 356 (Mo. 1995) (upholding validity of including nonresident income - which was not taxable by state - in determining state tax rate); ***Brady v. State***, 607 N.E.2d 1060 (N.Y. Ct. App. 1992) (upholding validity of including nonresident income - which was not taxable by state - in determining state tax rate); ***Stevens V. State Tax Assessor***, 571 A.2d 1195 (1990), *cert. denied*, 498 U.S. 819, 111 S.Ct. 65, L.Ed.2d 40 (upholding validity of including nonresident income - which was not taxable by state - in determining state tax rate); ***Wheeler v. State***, 127 Vt. 361, 249 A.2d 887 (1969) (upholding validity of including nonresident income — which was not taxable by State — in determining State tax rate); ***United States v. State of Kansas***, 810 F.2d 935 (10th Cir.)(1987) (upholding validity of including nonresident military income — which was not taxable by State — in determining State tax rate);

Aronov v. Secretary of Revenue, 323 N.C. 132, 371 S.E.2d 468 (1988) (upholding requirement that nonresident taxpayer reduce net operating loss from North Carolina partnership by amount of out-of-state income), *cert. denied* 489 U.S. 1096, 109 S.Ct. 1568, 103 L.Ed.2d 935 (1989).

In the present case the Oklahoma court followed the holding of this Court in ***Maxwell*** by finding that:

> "Use of out-of-state income to calculate a tax rate for in-state income in no way represents a tax on the out-of-state income." ***Walters, et.al., v. State of Oklahoma, ex rel. Oklahoma Tax Comm'n.***, 935 P.2d 398 (Okla. App. 1996).

> **c. Over the past twenty-six (26) years only six courts have been called on to decide the issue presented by Petitioner in this case. In each and every case the courts have followed the settled federal law.**

Petitioner argues that the decision below represents a decision that is not based on settled Federal Law and that this Court needs to grant Certiorari to settle this important federal question. The Petitioner begrudgingly recognizes this Court's holding in ***Maxwell*** and offers little but personal disagreement with that decision in support of his petition. This Court settled the very issue Petitioner presents here in ***Maxwell*** when the Court stated:

> "When the state levies taxes within its authority, property not in itself taxable by the state may be used as a measure of the tax imposed. This principle has been frequently declared by decisions of this court." (*Id.* 539, 40 S.Ct. at 6.)

The sole issue in this case is whether a state can include property not subject to taxation within the state as a measure of the tax rate. This Court decided that issue in the *Maxwell* case. The challenged Oklahoma statute does not tax property without the state, only income within, and only refers to out-of-state income as a means of establishing a tax rate. That progressive tax rate is established, in part, by determining the taxpayer's ability to pay; that determination is based upon the total income of the taxpayer. The challenged statute brings equity to Oklahoma's progressive income tax system by placing nonresidents and residents on a more equal footing in regards to the tax rate their Oklahoma income is taxed at.

d. The issue in the present case has not been a continuing source of controversy and litigation in both state and federal courts. Accordingly courts do not need guidance in this area.

Petitioner further argues that this Court should grant certiorari in this case because the issue present in this case has "been a continuing source of controversy and litigation in both state and federal courts." and therefore this Court needs to step in and settle the issue. The Petitioner has cited five (5) state cases and one (1) federal case dealing with the issue at controversy in this case. These six (6) cases were spread out over a twenty-six (26) year period. What the Petitioner fails to mention is that in each and every case the courts all reached the same conclusion, which is that this area of the law was settled by this Court with the *Maxwell* case.

CONCLUSION

The decision below is correct and squarely on point with the decisions of this Court and those of other state courts of last resort

that have addressed this issue. The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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No. 97-55

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

FRANK KEATING, Governor of the State of Oklahoma
and KEN FEAGINS, a nonresident individual,

Petitioners,

—v.—

STATE OF OKLAHOMA, ex rel.,
OKLAHOMA TAX COMMISSION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF OKLAHOMA—DIVISION NO. 1

MOTION FOR LEAVE TO FILE AND BRIEF OF PASCALE GELLY AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION

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Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF OKLAHOMA—DIVISION NO. 1

MOTION BY PASCALE GELLY FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF THE PETITION

Pascale Gelly ("Gelly") respectfully moves for leave to file the attached brief *amicus curiae*. Consent of the attorneys for the petitioners has been obtained. The consent of the attorneys for the respondent was requested but refused.

My name is Pascale Gelly. I am a French citizen and resident, an associate attorney for a major international law firm in Paris, France. I am licensed to practice law before the Paris Court of Appeals, *i.e.*, avocat a la Cour d'Appel de Paris, and I teach as an adjunct teaching assistant of intellectual property law at the Law School of the University of Sceaux - Paris XI.

I received my LL.M. degree in law from Columbia Law School. My interest in the case at bar is primarily academic, stemming from my international background and legal training in both France and the United States. I am intrigued by the practical operation of various state laws upon United States citizens in light of both state and federal interests under the United States Constitution.

More importantly, however, is my observation that France does not take into account the extraterritorial income of nonresident taxpayers when calculating their income tax liability. France considers only the nonresident's income earned in France. Section 4A of the French General Tax Code.

I desire to participate *amicus curiae* "[a]s *Abbott's Dictionary of Terms and Phrases* describes it:

> "A friend of the court. A term applied to a bystander, who without having an interest in the cause, of his [or her] knowledge makes suggestion on a point of law or of fact for the information of the presiding judge."

Samuel Krislov, *The Amicus Curiae Brief: From Friendship To Advocacy*, 72 Yale L.J. 694 (1963).

My perspective on the issue is unique in that it is presented from the eyes of a third party foreign citizen who practices and teaches intellectual property law in France. I desire to submit the attached brief *amicus curiae* in order to provide this Court with an international perspective as a French citizen, regarding Section 2362 of the Oklahoma Tax Code and its potential negative impact on interstate trade and its potential corresponding detrimental effect on the relationships between various states.

My observations regarding Section 2362 of the Oklahoma Tax Code are as follows:

1. The New Statute Is Unjustified

The essence of State law is to have a territorial application. It should apply to situations which are within the borders of the relevant State.

It is obvious that the new Section 2362 has an extraterritorial application insofar as it applies to economical situations which do not have any relationship with the State of Oklahoma. Indeed, the new statute aims at taking into consideration for the calculation of state income, tax revenues acquired without any direct nor indirect link with the economy of Oklahoma since said revenues do not have to derive from activities performed within the borders of the State of Oklahoma.

Reviewing the decision of the Oklahoma Court of Appeals, *i.e., Walters, et al., v. State of Oklahoma, ex. rel., Oklahoma Tax Comm'n*, 935 P.2d 398 (Okla. Ct. App. 1996), where Section 2362 had been challenged, two arguments struck me: I read that the purpose of the new statute is not to levy tax and that it is not based on taxing out-of-state income.

First of all, a change in tax law is never innocent; it aims either at decreasing taxes or at increasing them. In this case, the purpose is clear: if the applicable tax rate is determined by the amount of income of a person, the more sources of income are taken into consideration to set the tax rate, the higher the rate is and ineluctably the higher the taxes are.

Besides, even if out-of-state income is not directly taxed, it is used to determine the applicable tax rate. It is then obvious that the scheme organized by Section 2362 has been set up to dissimulate an indirect tax on out-of-state income.

To take an example, a nonresident which could be a potential client of mine located in Texas but having also activities in Oklahoma would see his or her general taxation increase by the application of Section 2362. Lets say, for example, that he/she earns $500,000.00 in Texas and $200,000.00 in

Oklahoma in 1997 and that income tax rates in Oklahoma are of 8% for an income between $100,000.00 and $300,000.00 and 10% for an income between $300,000.00 and $1,000,000.00. If only revenues earned in Oklahoma were taken into consideration, the rate of tax would be 8%, but if the rate determination is also based on Texan revenues, the rate would be 10%.

The issue is to search for what is the justification for such an increase in taxes to be paid. The justification is merely that an extra territorial event, *i.e.*, Texan income, is being appropriated by the State of Oklahoma although there is no economical link between the source of income and the State of Oklahoma. Oklahoma is simply creating with Section 2362 a legal link where there is no economical link within its territory. Section 2362 has then an extraterritorial application which seems to me as going beyond what should be a State's authority, with no other justification other than increasing taxes.

2. Section 2362 May Be Detrimental To Interstate Commerce

The amendment to Section 2362 is very likely to have detrimental effects on interstate commerce. Instead of making efforts to develop his or her activities in Oklahoma, this potential client of mine may elect to concentrate his or her efforts in the Texas market.

For example, if my potential client were to earn income in five (5) states, each having a progressive income tax law similar to Section 2362, his or her income earned in those states would be taken into account for the purpose of determining his or her income earned in those states would be taken into account for the purpose of determining his or her tax rate in each State and would effect a larger income tax paid to each State. For each additional state, the increase in my client's state income tax liability would be compounded and delete-

rious to any incentive to develop economic activities in those states. Who would want to develop activities in a State where nonresidents are taxed under such circumstances?

If the constitutionality of Section 2362 is upheld, other states may be encouraged to enact similar laws. As more states follow this trend, it is easy to imagine that it would lead to conflicts between the states in the form of retaliatory legislation.

Accordingly, Pascale Gelly respectfully moves for leave to file the attached brief *amicus curiae*.

Respectfully submitted,

/s/ KEN FEAGINS
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QUESTIONS PRESENTED

1. Is this Court's prior decision in *Maxwell v. Bugbee*, 250 U.S. 525 (1919), viable under *Stare Decisis*?

2. Whether the Oklahoma Court of Appeals has read *Maxwell* too broadly in light of Footnote Number 11 in *Oklahoma Tax Comm'n v. Chickasaw Nation*, 115 S.Ct. 2214, 2222 n.11 (1995).

3. Should the rational of *Maxwell v. Bugbee*, 250 U.S. 525 (1919) be applied to a progressive state income tax?

PARTIES TO THE PROCEEDING

Respondent the State of Oklahoma, ex rel., the Oklahoma Tax Commission was the Respondent-Appellee below. Petitioner Governor Frank Keating succeeded Governor David Walters as Governor of the State of Oklahoma and is automatically substituted as a party pursuant to Sup.Ct.Rule 35.3. Governor Walters and Ken Feagins were the Petitioners-Appellants below.

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IN THE

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OCTOBER TERM, 1997

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Petitioners,

—v.—

STATE OF OKLAHOMA, ex rel.,
OKLAHOMA TAX COMMISSION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF OKLAHOMA—DIVISION NO. 1

BRIEF OF PASCALE GELLY AS *AMICUS CURIAE* IN SUPPORT OF PETITION

INTEREST OF *AMICUS CURIAE*

The interest of *amicus curiae* appears in the foregoing motion.[1]

[1] *Counsel of Record* for Petitioners, Ken Feagins, authored this brief. Sup.Ct.R. 37.6.

STATEMENT OF THE CASE

Oklahoma has a progressive income taxation scheme. Under a progressive tax system, the tax rate of a person who earns $50,000.00 per year is higher than that an individual who earns $5,000.00. Petitioners seek certiorari to review an opinion of the Court of Appeals of the State of Oklahoma - Division No. 1, which affirmed the trial court's judgment for Respondent. At issue is the constitutionality of Section 27 of Senate Bill 1121, which amended Section 2362 of the Oklahoma Tax Code (Okla. Stat. tit. 68 § 2362 (1994)) ("Section 2362").

The amendment to Section 2362 changed the method of calculating the state income tax liability of **nonresident** individuals. Prior to the amendment, Section 2362 provided that the taxable income of a nonresident individual was the same as if he or she were a resident individual and the nonresident's adjusted gross income as reported to the federal government was excludable from state taxable income unless the income was attributable to ownership of property, conduct of business, trade, or profession, or other business or property in Oklahoma. Section 2362 currently takes into account a nonresident's out-of-state income having no nexus with the State. As a direct result of the higher tax rate imposed by the Section 2362's inclusion of the nonresident taxpayer's out-of-state income, the current economic reality facing nonresident state income taxpayers in Oklahoma is more money out-of-pocket, paid to the Oklahoma Tax Commission in Oklahoma Income tax.

Prior to the amendment to Section 2362, the Oklahoma Tax Commission predicted that the amendment would raise an additional 18 million dollars ($18,000,000.00) per year in revenue.

Petitioners commenced this action in state district court and challenged the constitutionality of Section 2362 under the

Oklahoma and United States Constitutions. Petitioners' federal constitutional claims included the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution, the Privileges and Immunities Clause and the Commerce Clause of the United States Constitution. The Oklahoma Court of Appeals rejected Petitioners' federal constitutional challenges to Section 2362 by adopting a formalistic approach to the issue currently raised by the Petition. *See Walters, et al. v. State of Oklahoma, ex rel., Oklahoma Tax Comm'n*, 935 P.2d 398 (Okla. Ct. App. 1996) Petition at 7a.

Petitioners' case is the latest in a series of recent challenges to the decisions of state courts of last resort that have relied upon this Court's prior decision in *Maxwell v. Bugbee*, 250 U.S. 525 (1919), to uphold similar state progressive income taxation schemes. By taking nonresidents' out-of-state income into account in order to impose a higher tax rate on their instate income, Section 2362 indirectly taxes the extraterritorial income of nonresidents and imposes an income tax derived from sources beyond the borders of Oklahoma.

As in *Matteson v. Director of Revenue, State of Missouri*, 909 S.W.2d 356, 358-59 (Mo. 1995); *Brady v. State*, 607 N.E.2d 1060 (N.Y. Ct. App. 1992), *cert. denied*, 113 S.Ct. 2998 (1993); *Stevens v. State Tax Assessor*, 571 A.2d 1195, 1197 (Me. 1990), *cert. denied*, 498 U.S. 819 (1990); *Aronov v. Secretary of Revenue*, 371 S.E.2d 468, 471 (N.C. 1988), *cert. denied*, 109 S.Ct. 1568, *reh'g denied*, 489 U.S. 1096 (1989); *Wheeler v. State*, 249 A.2d 887, 891 (Vt. 1969), *appeal dismissed*, 396 U.S. 4 (1969), *and United States v. Kansas*, 810 F.2d 935, 938 (10th Cir. 1987), in *Walters et al., v. State of Oklahoma, ex rel., Oklahoma Tax Commission*, 935 P.2d 398 (Okla. Ct. App. 1996), the Oklahoma Court of Appeals ignored this Court's recent decision in *Oklahoma Tax Comm'n v. Chickasaw Nation*, 1155 Ct. 2214, 2222 n.11 (1995). Rather than follow *Chickasaw Nation*, the Court below relied upon and extended the *Maxwell* holding.

In each of the foregoing decisions, the court decided a substantial and unsettled question arising under the Constitution by *extending* the *Maxwell* holding, which specifically addressed a New Jersey progressive estate "death" tax, to a state income taxation scheme. Each court relied on *Maxwell* to uphold under the federal constitution the inclusion in a state progressive income taxation scheme a nonresident's extraterritorial income having no nexus to the taxing jurisdiction in order to impose a higher tax rate on the nonresident's instate income. The result—a larger tax, derived from sources beyond the borders of Oklahoma.

The Petitioners herein are the most recent participants in this expanding waive of national controversy.

REASONS FOR GRANTING THE WRIT

The Petition for a Writ of Certiorari in this case should be granted for reasons stemming from one specifically set forth in Rule 10(c) of the Rules of the United States Supreme Court, because the Oklahoma Court of Appeals, several other state courts of last resort, and the United States Court of Appeals for the Tenth Circuit have "decided an important question of federal law that has not been, but should be, settled by this Court". Sup.Ct.R. 10(c).

A. The Opinion Below, The Decisions Of Other State Courts of Last Resort, And The Decision Of United States Court Of Appeals For The Tenth Circuit, Decided An Important Question Of Federal Law That Has Not Been, But Should Be, Settled By This Court

Certiorari may be granted despite the absence of a conflict where a state court has decided a substantial and unsettled federal question arising under the Constitution. *See*, Sup.Ct.R. 10(c); Robert L. Stern *et al.*, *Supreme Court Practice* 209-210 (7th ed. 1993) (*citing Oregon v. Kennedy*, 456 U.S. 667, 668-69 (1982)). By ignoring footnote number 11 in *Chickasaw*

Nation and relying on *Maxwell* to uphold under the federal Due Process Clause the state's inclusion of nonresidents' extraterritorial—nontaxable—income to determine the tax rate in a progressive income taxation scheme, the Court below decided an important and substantial federal question arising under the U.S. Constitution that has not been resolved by this Court.

Accordingly, despite the absence of a conflict among the lower courts, this Court should grant certiorari in order to resolve the specific federal question raised by the Petition. *See, e.g., Malloy v. Hogan*, 378 U.S. 1 (1964); *Gideon v. Wainwright*, 371 U.S. 335 (1963). *See also, Chickasaw Nation*, 115 S.Ct. at 2222 n.11.

1. *Maxwell* Is No Longer Viable Under *Stare Decisis*

Because the issue raised by the Petition is a constitutional question, this Court is less constrained by the principle of *stare decisis*:

> " '*Stare decisis* is usually a wise policy, because in most matters it is more important that the applicable rule of law be settled than it be settled right. . . . This is commonly true even where the error is a matter of serious concern, provided correction can be had by legislation. **But in cases involving the Federal Constitution**, where correction through legislative action is practically impossible, **this Court has often overruled its earlier decisions**. The Court bows to lessons of experience and the force of better reasoning, recognizing that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function.' "

Edelman v. Jordan, 415 U.S. 651, 671 n.14 (1974) (*citing Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406-408 (1932) (Brandeis, J., dissenting)) (emphasis added). In addition, Justice Douglas observed that "[t]he place of *stare decisis* in con-

stitutional law is even more tenuous" and "[s]o far as constitutional law is concerned *stare decisis* must give way before the dynamic component of history." William O. Douglas, *Stare Decisis*, 49 Colum.L.Rev. 735, 736-37 (1949).

Historically, this Court has been inclined to overrule on constitutional grounds cases related to the taxing power of state governments. For example, during one thirty-year period between 1860 and 1890, this Court overruled (expressly or in effect) eighteen controlling precedents. *See, id.* In another period "from 1937-March 28, 1949", out of 30 cases the Court overruled, 21 of those were on constitutional grounds. *See, id.* And out of those 21 cases this Court overruled on constitutional grounds, the "largest group—8 in number—related to the taxing power of state and federal governments". *Id.* at 743. "Tax rates had become more burdensome than ever before in our history". *Id.*

In *Maxwell*, this Court implemented a formalistic approach acceptable in 1919 to review a New Jersey progressive inheritance tax statute that required the inclusion of the entire estate of a nonresident decedent, wherever the property was located, to determine the rate by which the New Jersey property would be taxed. The New Jersey statute subsequently reduced the tax amount to reflect the percentage of the nonresident decedent's estate located in New Jersey. *Maxwell*, 250 U.S. at 532-33. A divided Court (5/4 decision) upheld the New Jersey inheritance statute and rejected the federal constitutional challenges to the statute, including Due Process.

Five members of the divided Court employed a formalistic approach to decision-making and stated:

> "It is not disputed that, consistently with the Federal Constitution, **a State may not tax property beyond its territorial jurisdiction**, *but* **the subject-matter here regulated** is a *privilege to succeed to property* ***which is within the jurisdiction*** *of the State*.
>
> * * *

> In the present case the State imposes a *privilege tax*, clearly within its authority, and it has adopted as *a measure of that tax* the proportion which the specified local property bears to the entire estate of the decedent. The transfer of certain property within the State is taxed by a rule which considers the entire estate in arriving at the amount of tax. *It is in no just sense a tax upon foreign property, real or personal.*"

Maxwell, 250 U.S. at 539 (emphasis added).

On the other hand, four members of the Court, including Justice Holmes, applied an **economic realities and practical operation** approach and determined that the exaction from nonresident decedents amounted to an indirect tax. The economic reality was an unconstitutional deprivation of property without due process.

Justice Holmes stated in relevant part:

> "It seems to me that *when property outside the State is taken into account* ***for the purpose of increasing the tax upon property within it, the property outside is taxed in effect,*** *no matter what form of words may be used.* It appears to me that this cannot be done, even if it should be done in such a way as to secure equality between residents in New Jersey and those in other States."

Maxwell, 250 U.S. at 544 (Holmes, J., dissenting) (emphasis added).

Since *Maxwell* was decided at the turn of the century, historic events have occurred which make *Maxwell* obsolete in light of current economic conditions and social policies in this country. For example, the term "interstate commerce" has a vastly different connotation and meaning in 1997 than it did in 1919. It is quite common in 1997 for a resident of one state to earn income in several states and to be taxed accordingly by those states and mere days ago, the U.S. Congress enacted historic tax legislation unprecedented in recent times!

Moreover, since *Maxwell* this Court has rejected the antiquated formalism approach to decision-making. *See, e.g., Wisconsin v. J.C. Penney Co.*, 311 U.S. 435, 443-44 (1940).

In *J.C. Penney*, this Court stated:

> "A tax is an exaction. Ascertainment of the scope of the exaction—what is included in it—is for the state court. **But the descriptive pigeon-hole into which a state court puts a tax is of no moment in determining the constitutional significance of the exaction.** 'In whatever language a statute may be framed, **its purpose must be determined by its natural and reasonable effect.**' *Henderson v. Mayor of New York*, 92 U.S. 259, 268. Such has been the repeated import of the cases which only recently were well summarized by the guiding formulation for adjudicating a tax measure, that '**in passing on its constitutionality we are concerned only with its practical operation**, *not its definition or the precise form of descriptive words which may be applied to it.*' *Lawrence v. State Tax Commission*, 286 U.S. 276, 280."

Wisconsin v. J.C. Penney Co., 311 U.S. at 443-44 (emphasis added).

The majority's holding in *Maxwell* has subsequently been called into question by this Court and members of the academy. *See Frick v. Pennsylvania*, 268 U.S. 473, 495 (1924) (*noting* that the *Maxwell* holding "is on the border line, as is evidenced by the dissent of four members of the court."). *See*, Walter Hellerstein, *Some Reflections on the State Taxation of a Nonresident's Personal Income*, 72 Mich.L.Rev.1308, 1317 n.53 (1974); Charles L.B. Lowndes, *Rate and Measure in Jurisdiction to Tax—Aftermath of Maxwell v. Bugbee*, 49 Harv.L.Rev. 756, 768-773 (1936) (*discussing* the application of the Maxwell holding to a progressive income tax); *id.* at 770 (stating "[i]t is difficult, however, to imagine anything more iniquitously unfair than the application of the *Maxwell*

v. Bugbee formula to income taxation in the present state of the decisions on state jurisdiction to tax income.").

In *Chickasaw Nation*, this Court recently stated that "a jurisdiction, such as Oklahoma, may tax *all* the income *of its residents*, even income earned outside the taxing jurisdiction". As to the **income** of **nonresidents**, however, a taxing jurisdiction such as Oklahoma **is much more restricted in its power to tax** and must tax only the **income derived from sources within the borders of the State**:

> "**For nonresidents**, *in contrast*, jurisdictions generally may tax **only income earned *within the jurisdiction***. See *Shaffer v. Carter*, 252 U.S. 37, 57, 40 S.Ct. 221, 227, 64 L.Ed. 445 (1920) (as to residents, a State 'may, and does, exert its taxing power over their income from all sources'; **as to nonresidents**, '*the tax is only on such income* as is derived from . . . **sources [within the State]**')"

Oklahoma Tax Comm'n v. Chickasaw Nation, 115 S.Ct. 2214, 2222 n.11 (1995) (emphasis added).

Times have changed dramatically since *Maxwell* was decided. Accordingly, because the issue raised by the Petition is a constitutional question, in light of footnote No. 11 in *Chickasaw Nation*, wisdom, the rule of reason and the doctrine of *stare decisis* should lead this Court to revisit, distinguish, modify or simply overrule its prior decision in *Maxwell* to fit today's current facts.

2. The State Court Below Has Read *Maxwell* Too Broadly

This Court may grant certiorari to determine whether the state court has properly interpreted, applied, or extended a prior decision of this Court. *Oregon v. Mathiason*, 429 U.S. 492, 493 (1977) (certiorari granted because state court "has read *Miranda* too broadly"). In light of footnote No. 11 in *Chickasaw Nation*, it is obvious that the Oklahoma Court below has read *Maxwell* too broadly.

The *Maxwell* decision addressed a progressive state privilege **death** tax, not a progressive state **income** tax such as Section 2362. Moreover, in *Oklahoma Tax Comm'n v. Chickasaw Nation*, this Court clearly articulated a limitation of a State's taxing power in relation to a nonresident's extraterritorial income:

> "**For nonresidents**, *in contrast*, jurisdictions generally may tax **only income earned *within the jurisdiction***. See *Shaffer v. Carter*, 252 U.S. 37, 57, 40 S.Ct. 221, 227, 64 L.Ed. 445 (1920) (as to residents, a State 'may, and does, exert its taxing power over their income from all sources'; **as to nonresidents**, '*the tax is only on such income* as is derived from . . . **sources [within the State]**')"

Oklahoma Tax Comm'n v. Chickasaw Nation, 115 S.Ct. 2214, 2222 n.11 (emphasis added).

By ignoring Footnote No. 11 and relying instead on *Maxwell* to uphold Oklahoma's exertion of its taxing power to nonresidents' income from sources beyond the borders of the State, the Oklahoma Court of Appeals inappropriately upheld an income tax on nonresidents in that the tax rate pursuant to Section 2362 leads to the imposition of an income tax on nonresidents that is derived from sources beyond the borders of Oklahoma.

Accordingly, certiorari should issue in this case.

B. The Opinion Below Presents Important Questions Touching The Accommodation Of State And Federal Interests Under The Constitution.

This Court may grant certiorari when the state court decision seems "to present important questions touching the accommodation of state and federal interests under the Constitution." *Kosydar v. National Cash Register Co.*, 417 U.S. 62, 65 (1974). The issue in *Kosydar* was whether the assessment of an ad valorem personal property tax by the State of

Ohio pursuant to its state tax laws upon certain property in storage awaiting export was in conflict with the federal Constitution's Import-Export Clause, Art.I, § 10, cl. 2, which provides exports with immunity from state taxation. The Ohio Supreme Court had interpreted the federal constitutional provision in conjunction with the State of Ohio's tax laws. Because this Court determined that "the case seemed to present important questions touching the accommodation of state and federal interests under the Constitution", certiorari was granted. *Kosydar*, 417 U.S. at 65.

The issue raised in the Petition is whether Section 2362 of the Oklahoma Tax Code offends the Due Process Clause of the Fourteenth Amendment to the United States Constitution by an indirect tax of a nonresident's income derived from sources beyond the borders of Oklahoma.

Because this case also seems to "present important questions touching the accommodation of state and federal interests under the Constitution", this Court should grant certiorari.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Dated: August 7, 1997.

Respectfully submitted,

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No. 97-55

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MOTION FILED AUG 7. 1997

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

FRANK KEATING, Governor of the State of Oklahoma and KEN FEAGINS, a nonresident individual,

Petitioners,

—v.—

STATE OF OKLAHOMA, ex rel., OKLAHOMA TAX COMMISSION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF OKLAHOMA—DIVISION NO. 1

MOTION FOR LEAVE TO FILE AND BRIEF OF OKLAHOMA CITIZENS FOR A SOUND ECONOMY *AMICUS CURIAE* IN SUPPORT OF THE PETITION

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ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF OKLAHOMA—DIVISION NO. 1

MOTION BY OKLAHOMA CITIZENS FOR A SOUND ECONOMY FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF THE PETITION

Oklahoma Citizens for a Sound Economy respectfully move for leave to file the attached brief *amicus curiae*. Consent of the attorneys for the petitioners has been obtained. The consent of the attorneys for the respondent was requested but refused.

Oklahoma Citizens for a Sound Economy ("Oklahoma CSE") is a public policy think-tank supporting free market

principles in economic issues. With a 7,000 member base in Oklahoma, Oklahoma CSE advocates less taxation, less government spending and less government regulation in support of consumers' rights to greater product quality at a lower price. It is through competition, not protection, which consumers truly benefit in the market place.

Our interest in *Keating v. State of Oklahoma, ex rel, Oklahoma Tax Commission* is the economic well being of non-residents being taxed at a rate that exceeds the income actually earned in this State. It is our belief that taxing non-residents at a higher rate has a deleterious effect in the attraction and permanent location of individuals to Oklahoma.

This case is of great concern to the *amicus curiae*.

Accordingly, Oklahoma CSE moves for leave to file the attached brief *amicus curiae*.

Respectfully submitted,

/s/ KEN FEAGINS

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Date: August 7, 1997

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QUESTIONS PRESENTED

1. Is this Court's prior decision in *Maxwell v. Bugbee*, 250 U.S. 525 (1919), viable under *Stare Decisis*?

2. Whether the Oklahoma Court of Appeals has read *Maxwell* too broadly in light of *Oklahoma Tax Comm'n v. Chickasaw Nation*, 115 S.Ct. 2214, 2222 n.11 (1995).

3. Should the rational of *Maxwell v. Bugbee*, 250 U.S. 525 (1919) be applied to a progressive state income tax?

PARTIES TO THE PROCEEDING

Respondent the State of Oklahoma, ex rel., the Oklahoma Tax Commission was the Respondent-Appellee below. Petitioner Governor Frank Keating succeeded Governor David Walters as Governor of the State of Oklahoma and is automatically substituted as a party pursuant to Sup.Ct.Rule 35.3. Governor Walters and Ken Feagins were the Petitioners-Appellants below.

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BRIEF OF OKLAHOMA CITIZENS FOR A SOUND ECONOMY *AMICUS CURIAE* IN SUPPORT OF THE PETITION

INTEREST OF *AMICUS CURIAE*

The interest of *amicus curiae* appears in the foregoing motion.[1]

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[1] Counsel of Record for Petitioners, Ken Feagins, authored this brief. Sup.Ct.R. 37.6.

STATEMENT OF THE CASE

Oklahoma has a progressive income taxation scheme. Under a progressive tax system, the tax rate of a person who earns $50,000.00 per year is higher than that an individual who earns $5,000.00. Petitioners seek certiorari to review an opinion of the Court of Appeals of the State of Oklahoma - Division No. 1, which affirmed the trial court's judgment for Respondent. At issue is the constitutionality of Section 27 of Senate Bill 1121, which amended Section 2362 of the Oklahoma Tax Code (Okla. Stat. tit. 68 § 2362 (1994)) ("Section 2362").

The amendment to Section 2362 changed the method of calculating the state income tax liability of **nonresident** individuals. Prior to the amendment, Section 2362 provided that the taxable income of a nonresident individual was the same as if he or she were a resident individual and the nonresident's adjusted gross income as reported to the federal government was excludable from state taxable income unless the income was attributable to ownership of property, conduct of business, trade, or profession, or other business or property in Oklahoma. Section 2362 currently takes into account a nonresident's out-of-state income having no nexus with the State. As a direct result of the higher tax rate imposed by the Section 2362's inclusion of the nonresident taxpayer's out-of-state income, the current economic reality facing nonresident state income taxpayers in Oklahoma is more money out-of-pocket, paid to the Oklahoma Tax Commission in Oklahoma Income tax.

Prior to the amendment to Section 2362, the Oklahoma Tax Commission predicted that the amendment would raise an additional 18 million dollars ($18,000,000.00) per year in revenue.

Petitioners commenced this action in state district court and challenged the constitutionality of Section 2362 under the Oklahoma and United States Constitutions. Petitioners'

federal constitutional claims included the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution, the Privileges and Immunities Clause and the Commerce Clause of the United States Constitution.

Petitioners' case is the latest in a series of recent challenges to the decisions of state courts of last resort that have relied upon this Court's prior decision in *Maxwell v. Bugbee*, 250 U.S. 525 (1919), to uphold similar state progressive income taxation schemes. By taking nonresidents' out-of-state income into account in order to impose a higher tax rate, Section 2362 indirectly taxes the extraterritorial income of nonresidents, deriving the tax from sources outside of Oklahoma. *Oklahoma Tax Comm'n v. Chickasaw Nation*, 115 S.Ct. 2214, 2222 n.11 (1995).

As in *Matteson v. Director of Revenue, State of Missouri*, 909 S.W.2d 356, 358-59 (Mo. 1995); *Brady v. State*, 607 N.E.2d 1060 (N.Y. Ct. App. 1992), *cert. denied*, 113 S.Ct. 2998 (1993); *Stevens v. State Tax Assessor*, 571 A.2d 1195, 1197 (Me. 1990), *cert. denied*, 498 U.S. 819 (1990); *Aronov v. Secretary of Revenue*, 371 S.E.2d 468, 471 (N.C. 1988), *cert. denied*, 109 S.Ct. 1568, *reh'g denied*, 489 U.S. 1096 (1989); *Wheeler v. State*, 249 A.2d 887, 891 (Vt. 1969), *appeal dismissed*, 396 U.S. 4 (1969), and *United States v. Kansas*, 810 F.2d 935, 938 (10th Cir. 1987), in *Walters et al., v. State of Oklahoma, ex rel., Oklahoma Tax Commission*, 935 P.2d 398 (Okla. Ct. App. 1996), the Oklahoma Court of Appeals relied upon and extended the *Maxwell* holding to uphold under the federal Constitution Petitioners' challenges to Section 2362.

In each of the foregoing decisions, the court decided a substantial and unsettled question arising under the U.S. Constitution by extending the *Maxwell* holding. *Maxwell* specifically addressed a New Jersey progressive estate "death" tax. *Maxwell* did not address a state income taxation scheme. Each

court, *supra*, relied on *Maxwell* to uphold under the federal constitution the inclusion in a state progressive income taxation scheme a nonresident's extraterritorial income having no nexus to the taxing jurisdiction. The result—a higher tax rate and a larger tax derived from sources outside of Oklahoma.

The Petitioners herein are merely the most recent participants in this expanding waive of national controversy.

REASONS FOR GRANTING THE WRIT

The Petition for a Writ of Certiorari in this case should be granted for reasons stemming from one specifically set forth in Rule 10(c) of the Rules of the United States Supreme Court, because the Oklahoma Court of Appeals, several other state courts of last resort, and the United States Court of Appeals for the Tenth Circuit have "decided an important question of federal law that has not been, but should be, settled by this Court". Sup.Ct.R. 10(c).

A. The Opinion Below, The Decisions Of Other State Courts of Last Resort, And The Decision Of United States Court Of Appeals For The Tenth Circuit, Decided An Important Question Of Federal Law That Has Not Been, But Should Be, Settled By This Court

Certiorari may be granted despite the absence of a conflict where a state court has decided a substantial and unsettled federal question arising under the Constitution. *See*, Sup.Ct.R. 10(c); Robert L. Stern *et al.*, Supreme Court Practice 209-210 (7th ed. 1993) (*citing Oregon v. Kennedy*, 456 U.S. 667, 668-69 (1982)). By relying on *Maxwell* to uphold under the federal Due Process Clause the state's inclusion of nonresidents' extraterritorial—nontaxable—income to determine the tax rate in a progressive income taxation scheme, each court referenced, *supra*, decided an important and substantial federal question arising under the federal Constitution that was not

resolved by *Maxwell*. Moreover, to date, the issue raised by the Petition, has not been resolved by this Court.

Accordingly, despite the absence of a conflict among the lower courts, this Court should grant certiorari in order to resolve the specific federal question raised by the Petition, the source of ongoing controversy and litigation. *See, e.g., Malloy v. Hogan*, 378 U.S. 1 (1964); *Gideon v. Wainwright*, 371 U.S. 335 (1963).

1. *Maxwell* Is No Longer Viable Under *Stare Decisis*

Because the issue raised by the Petition is a constitutional question, this Court is less constrained by the principle of *stare decisis*:

> " '*Stare decisis* is usually a wise policy, because in most matters it is more important that the applicable rule of law be settled than it be settled right. . . . This is commonly true even where the error is a matter of serious concern, provided correction can be had by legislation. **But in cases involving the Federal Constitution**, where correction through legislative action is practically impossible, **this Court has often overruled its earlier decisions**. The Court bows to lessons of experience and the force of better reasoning, recognizing that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function.' "

Edelman v. Jordan, 415 U.S. 651, 671 n.14 (1974) (*citing Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406-408 (1932) (Brandeis, J., dissenting)) (emphasis added). In addition, Justice Douglas observed that "[t]he place of *stare decisis* in constitutional law is even more tenuous" and "[s]o far as constitutional law is concerned stare decisis must give way before the dynamic component of history." William O. Douglas, *Stare Decisis*, 49 Colum.L.Rev. 735, 736-37 (1949).

Historically, this Court has been inclined to overrule on constitutional grounds cases related to the taxing power of state governments. For example, during one thirty-year period between 1860 and 1890, this Court overruled (expressly or in effect) eighteen controlling precedents. *See, id.* In another period "from 1937-March 28, 1949", out of 30 cases the Court overruled, 21 of those were on constitutional grounds. *See, id.* And out of those 21 cases this Court overruled on constitutional grounds, the "largest group—8 in number—related to the taxing power of state and federal governments". *Id.* at 743. "Tax rates had become more burdensome than ever before in our history". *Id.*

In *Maxwell*, this Court implemented a formalistic approach acceptable in 1919 to review a New Jersey progressive inheritance tax statute that required the inclusion of the entire estate of a nonresident decedent, wherever the property was located, to determine the rate by which the New Jersey property would be taxed. The New Jersey statute subsequently reduced the tax amount to reflect the percentage of the nonresident decedent's estate located in New Jersey. *Maxwell*, 250 U.S. at 532-33. A divided Court (5/4 decision) upheld the New Jersey inheritance statute and rejected the federal constitutional challenges to the statute, including Due Process.

The majority employed a formalistic approach to decision-making and stated:

> "It is not disputed that, consistently with the Federal Constitution, **a State may not tax property beyond its territorial jurisdiction**, *but* **the subject-matter here regulated** is a *privilege to succeed to property* ***which is within the jurisdiction*** *of the State.*
>
> * * *
>
> In the present case the State imposes a *privilege tax*, clearly within its authority, and it has adopted as *a measure of that tax* the proportion which the specified local property bears to the entire estate of the decedent. The

> transfer of certain property within the State is taxed by a rule which considers the entire estate in arriving at the amount of tax. *It is in no just sense a tax upon foreign property, real or personal.*"

Maxwell, 250 U.S. at 539 (emphasis added).

On the other hand, four members of the Court, including Justice Holmes, applied an **economic realities and practical operation** approach. The economic reality was an unconstitutional deprivation of property without due process.

Justice Holmes stated in relevant part:

> "It seems to me that *when property outside the State is taken into account for the purpose of increasing the tax upon property within it, the property outside is taxed in effect, no matter what form of words may be used.* It appears to me that this cannot be done, even if it should be done in such a way as to secure equality between residents in New Jersey and those in other States."

Maxwell, 250 U.S. at 544 (Holmes, J., dissenting) (emphasis added).

Since *Maxwell* was decided at the turn of the century, historic events have occurred which make *Maxwell* obsolete in light of current economic conditions and social policies in this country. For example, our Congress recently enacted, and the President signed, one of the most comprehensive tax reform legislation packages in recent history! This Court has since rejected the antiquated formalism utilized by the *Maxwell* majority. *See, e.g., Wisconsin v. J.C. Penney Co.*, 311 U.S. 435, 443-44 (1940).

In *J.C. Penney*, this Court stated:

> "A tax is an exaction. Ascertainment of the scope of the exaction—what is included in it—is for the state court. **But the descriptive pigeon-hole into which a state court puts a tax is of no moment in determining**

> **the constitutional significance of the exaction.** 'In whatever language a statute may be framed, **its purpose must be determined by its natural and reasonable effect.**' *Henderson v. Mayor of New York*, 92 U.S. 259, 268. Such has been the repeated import of the cases which only recently were well summarized by the guiding formulation for adjudicating a tax measure, that '**in passing on its constitutionality we are concerned only with its practical operation**, *not its definition or the precise form of descriptive words which may be applied to it.*' *Lawrence v. State Tax Commission*, 286 U.S. 276, 280."

Wisconsin v. J.C. Penney Co., 311 U.S. at 443-44 (emphasis added).

Maxwell has been called into question by this Court and members of the academy. *See Frick v. Pennsylvania*, 268 U.S. 473, 495 (1924) (noting that the *Maxwell* holding "is on the border line, as is evidenced by the dissent of four members of the court."). *See*, Walter Hellerstein, *Some Reflections on the State Taxation of a Nonresident's Personal Income*, 72 Mich.L.Rev.1308, 1317 n.53 (1974); Charles L.B. Lowndes, *Rate and Measure in Jurisdiction to Tax—Aftermath of Maxwell v. Bugbee*, 49 Harv.L.Rev. 756, 768-773 (1936) (discussing the application of the *Maxwell* holding to a progressive income tax); *id.* at 770 (stating "[i]t is difficult, however, to imagine anything more iniquitously unfair than the application of the *Maxwell v. Bugbee* formula to income taxation in the present state of the decisions on state jurisdiction to tax income.").

A jurisdiction, such as Oklahoma, may tax all the income *of its* ***residents***, even income earned outside the taxing jurisdiction. As to the income of **nonresidents**, however, a taxing jurisdiction such as Oklahoma is much more restricted in its power to tax and must tax only the income derived from sources within the borders of the State:

> "**For nonresidents**, in contrast, jurisdictions generally may tax **only income earned within the jurisdiction**. See *Shaffer v. Carter*, 252 U.S. 37, 57, 40 S.Ct. 221, 227, 64 L.Ed. 445 (1920) (as to residents, a State 'may, and does, exert its taxing power over their income from all sources'; as to nonresidents, '*the tax is only on such income* as is **derived from . . . sources [within the State]**')"

Oklahoma Tax Comm'n v. Chickasaw Nation, 115 S.Ct. 2214, 2222 n.11 (1995) (emphasis added).

Because the issue raised in the Petition is a constitutional question and the practical operation and economic reality of Section 2362 is an indirect income tax derived from sources of income beyond the borders of Oklahoma, wisdom, the rule of reason and the doctrine of *stare decisis* should lead this Court to distinguish, modify or simply overrule *Maxwell* to fit today's current facts.

2. The State Court Below Has Read *Maxwell* Too Broadly

This Court may grant certiorari to determine whether the state court has properly interpreted, applied, or extended a prior decision of this Court. *Oregon v. Mathiason*, 429 U.S. 492, 493 (1977) (certiorari granted because state court "has read *Miranda* too broadly"). In the case at bar, the Oklahoma Court of Appeals has read *Maxwell* too broadly in light of this Court's recent decision in *Oklahoma Tax Comm'n v. Chickasaw Nation*, 115 S.Ct. 2214, 2222 n.11 (1995).

For example, the *Maxwell* decision addressed a progressive state **privilege death** tax, not a progressive state **income** tax, *Chickasaw Nation,* this Court clearly articulated the limitation of a State's taxing power in relation to a nonresident's income. The Court stated:

> "**For nonresidents**, in contrast, jurisdictions generally may tax **only income earned *within the jurisdiction***.

> See *Shaffer v. Carter*, 252 U.S. 37, 57, 40 S.Ct. 221, 227, 64 L.Ed. 445 (1920) (as to residents, a State 'may, and does, exert its taxing power over their income from all sources'; **as to nonresidents**, '*the tax is only on such income* as is **derived from . . . sources [within the State]**')"

Oklahoma Tax Comm'n v. Chickasaw Nation, 115 S.Ct. 2214, 2222 n.11 (emphasis added).

By relying on *Maxwell* to uphold Oklahoma's exertion of its taxing power to indirectly tax nonresidents' income derived from sources beyond the borders of the State, the Oklahoma Court of Appeals has read *Maxwell* too broadly in light of footnote No. 11 in *Chickasaw Nation*.

Accordingly, certiorari should issue in this case.

B. The Opinion Below Presents Important Questions Touching The Accommodation Of State And Federal Interests Under The Constitution

This Court may grant certiorari when the state court decision seems "to present important questions touching the accommodation of state and federal interests under the Constitution." *Kosydar v. National Cash Register Co.*, 417 U.S. 62, 65 (1974). The issue in *Kosydar* was whether the assessment of an ad valorem personal property tax by the State of Ohio pursuant to its state tax laws upon certain property in storage awaiting export was in conflict with the federal Constitution's Import-Export Clause, Art.I, § 10, cl. 2, which provides exports with immunity from state taxation. As in the decision below the Ohio Supreme Court had interpreted a federal constitutional provision in conjunction with the State tax laws. This Court determined that "the case seemed to present important questions touching the accommodation of state and federal interests under the Constitution" and granted certiorari.

The issue raised in the Petition is whether the State of Oklahoma's inclusion of nonresident's extraterritorial income having no nexus to the State in the calculation of the nonresident's Oklahoma income tax liability offends the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Because this case also seems to "present important questions touching the accommodation of state and federal interests under the Constitution", this Court should grant certiorari.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Dated: August 7, 1997.

Respectfully submitted,

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STATE OF OKLAHOMA, ex rel., OKLAHOMA TAX COMMISSION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF OKLAHOMA—DIVISION NO. 1

MOTION FOR LEAVE TO FILE AND BRIEF OF OKLAHOMANS FOR INTEGRITY IN GOVERNMENT AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION

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21 pp

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-55

FRANK KEATING, Governor of the State of Oklahoma
and KEN FEAGINS, a nonresident individual,

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—v.—

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Respondent.

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Oklahomans for Integrity in Government respectfully move for leave to file the attached brief *amicus curiae*. Consent of the attorneys for the petitioners has been obtained. The consent of the attorneys for the respondent was requested but refused.

Oklahomans for Integrity in Government ("OIG") is a bipartisan group of conservative Oklahoma citizens working for a just and moral government. This group of concerned citizens consists of approximately 475 members. OIG is recog-

nized statewide as a governmental watchdog organization which strives to keep its membership informed on issues of public importance to Oklahoma. For example, OIG publishes and distributes to its members *The Oklahoma EAGLE'S EYE*, a monthly newsletter which contains "Straight Talk", "Letters to the Eagle", and "Did You Know?" sections.

The purpose of O.I.G. is primarily an Educational Organization. Specifically based on the premise that if the General Public has the truthful information about any public issue and they are given an opportunity to make a choice on the issue; a majority of the people will make the right decision. O.I.G. serves as a medium to the General Public and affords them the opportunity to be heard on issues through the News Publication of the Eagle's Eye.

O.I.G.'s interest in the amendment to Section 2362 of the Oklahoma Tax Code is, in part, that it is exactly what the proponents say it isn't. 75% of O.I.G. Board of Directors were the motivating force behind the passage of State Question 640, an amendment to the Oklahoma Constitution that was approved by a vote of the people in a statewide general election. Senate Bill 1121 is enabling Legislation that brought more money into Okla. Treasury—that means more money was fleeced from the Okla. Tax Payers—which means the Tax Payers were taxed by the State of Oklahoma more heavily.

Because OIG advocates less governmnent and lower taxes, this case is of great concern to the *amicus curiae*.

Accordingly, Oklahomans For Integrity In Government respectfully move for leave to file the attached brief *amicus curiae*.

Respectfully submitted,

/s/ KEN FEAGINS

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QUESTIONS PRESENTED

1. Is this Court's prior decision in *Maxwell v. Bugbee*, 250 U.S. 525 (1919), viable under *Stare Decisis*?

2. Whether the Oklahoma Court of Appeals has read *Maxwell* too broadly.

3. Should the rational of *Maxwell v. Bugbee*, 250 U.S. 525 (1919) be applied to a progressive state income tax?

PARTIES TO THE PROCEEDING

Respondent the State of Oklahoma, ex rel., the Oklahoma Tax Commission was the Respondent-Appellee below. Petitioner Governor Frank Keating succeeded Governor David Walters as Governor of the State of Oklahoma and is automatically substituted as a party pursuant to Sup.Ct.Rule 35.3. Governor Walters and Ken Feagins were the Petitioners-Appellants below.

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INTEREST OF *AMICUS CURIAE*

The interest of *amicus curiae* appears in the foregoing motion.[1]

[1] *Counsel of Record* for Petitioners, Ken Feagins, authored this brief. Sup.Ct.R. 37.6.

STATEMENT OF THE CASE

Oklahoma has a progressive income taxation scheme. Under a progressive tax system, the tax rate of a person who earns $50,000.00 per year is higher than that an individual who earns $5,000.00. Petitioners seek certiorari to review an opinion of the Court of Appeals of the State of Oklahoma - Division No. 1, which affirmed the trial court's judgment for Respondent. At issue is the constitutionality of Section 27 of Senate Bill 1121, which amended Section 2362 of the Oklahoma Tax Code (Okla. Stat. tit. 68 § 2362 (1994)) ("Section 2362").

The amendment to Section 2362 changed the method of calculating the state income tax liability of **nonresident** individuals. Prior to the amendment, Section 2362 provided that the taxable income of a nonresident individual was the same as if he or she were a resident individual and the nonresident's adjusted gross income as reported to the federal government was excludable from state taxable income unless the income was attributable to ownership of property, conduct of business, trade, or profession, or other business or property in Oklahoma. Section 2362 currently takes into account a nonresident's out-of-state income having no nexus with the State. As a direct result of the higher tax rate imposed by the Section 2362's inclusion of the nonresident taxpayer's out-of-state income, the current economic reality facing nonresident state income taxpayers in Oklahoma is more money out-of-pocket, paid to the Oklahoma Tax Commission in Oklahoma Income tax.

Prior to the amendment to Section 2362, the Oklahoma Tax Commission predicted that the amendment would raise an additional 18 million dollars ($18,000,000.00) per year in revenue.

Petitioners commenced this action in state district court and challenged the constitutionality of Section 2362 under the Oklahoma and United States Constitutions. Petitioners'

federal constitutional claims included the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution, the Privileges and Immunities Clause and the Commerce Clause of the United States Constitution.

Petitioners' case is the latest in a series of recent challenges to the decisions of state courts of last resort that have relied upon this Court's prior decision in *Maxwell v. Bugbee*, 250 U.S. 525 (1919), to uphold similar state progressive income taxation schemes. By taking nonresidents' out-of-state income into account in order to impose a higher tax rate, Section 2362 indirectly taxes the extraterritorial income of nonresidents and derives the tax from sources beyond the borders of Oklahoma. *See Oklahoma Tax Comm'n v. Chickasaw Nation*, 115 S.Ct. 2214, 2222 n.11 (1995).

As in *Matteson v. Director of Revenue, State of Missouri*, 909 S.W.2d 356, 358-59 (Mo. 1995); *Brady v. State*, 607 N.E.2d 1060 (N.Y. Ct. App. 1992), *cert. denied*, 113 S.Ct. 2998 (1993); *Stevens v. State Tax Assessor*, 571 A.2d 1195, 1197 (Me. 1990), *cert. denied*, 498 U.S. 819 (1990); *Aronov v. Secretary of Revenue*, 371 S.E.2d 468, 471 (N.C. 1988), *cert. denied*, 109 S.Ct. 1568, *reh'g denied*, 489 U.S. 1096 (1989); *Wheeler v. State*, 249 A.2d 887, 891 (Vt. 1969), *appeal dismissed*, 396 U.S. 4 (1969), *and United States v. Kansas*, 810 F.2d 935, 938 (10th Cir. 1987), in *Walters et al., v. State of Oklahoma, ex rel., Oklahoma Tax Commission*, 935 P.2d 398 (Okla. Ct. App. 1996), the Oklahoma Court of Appeals relied upon and extended the *Maxwell* holding to uphold under the federal Constitution Petitioners' challenges to Section 2362.

In each of the foregoing decisions, the court decided a substantial and unsettled question arising under the U.S. Constitution by *extending* the *Maxwell* holding. *Maxwell* specifically addressed a New Jersey progressive estate "**death**" tax. This Court in *Maxwell* did not address a state **income** taxation scheme. Each court, *supra*, however, relied on *Maxwell* to

uphold under the federal constitution the inclusion in a state progressive income taxation scheme a nonresident's extraterritorial income having no nexus to the taxing jurisdiction. The result—a higher tax rate for the **nonresident** taxpayer and a larger tax that is derived from sources beyond the borders of Oklahoma. In this court's recent decision in *Oklahoma Tax Comm'n v. Chickasaw Nation*, 115 S.Ct. 2214, 2222 n.11 (1995), this Court unequivocally stated that a State is limited in its power to tax a nonresident's income to income derived from sources **within** the State.

The Petitioners herein are the most recent participants in this expanding waive of national controversy.

REASONS FOR GRANTING THE WRIT

The Petition for a Writ of Certiorari in this case should be granted for reasons stemming from one specifically set forth in Rule 10(c) of the Rules of the United States Supreme Court, because the Oklahoma Court of Appeals, several other state courts of last resort, and the United States Court of Appeals for the Tenth Circuit have "decided an important question of federal law that has not been, but should be, settled by this Court". Sup.Ct.R. 10(c).

A. The Opinion Below, The Decisions Of Other State Courts of Last Resort, And The Decision Of United States Court Of Appeals For The Tenth Circuit, Decided An Important Question Of Federal Law That Has Not Been, But Should Be, Settled By This Court

Certiorari may be granted despite the absence of a conflict where a state court has decided a substantial and unsettled federal question arising under the Constitution. *See*, Sup.Ct.R. 10(c); Robert L. Stern *et al.*, *Supreme Court Practice* 209-210 (7th ed. 1993) (*citing Oregon v. Kennedy*, 456 U.S. 667, 668-

69 (1982)). By relying on *Maxwell* to uphold under the federal Due Process Clause the state's inclusion of nonresidents' extraterritorial—nontaxable —income to determine the tax rate in a progressive income taxation scheme, each court referenced, *supra*, decided an important and substantial federal question arising under the federal Constitution that was not resolved by the specific *Maxwell* holding. The specific issue raised by the Petition remains unresolved by this Court.

Accordingly, despite the absence of a conflict among the lower courts, this Court should grant certiorari and resolve the specific federal question raised by the Petition. This malignant source of ongoing controversy and litigation should be removed. *See, e.g., Malloy v. Hogan*, 378 U.S. 1 (1964); *Gideon v. Wainwright*, 371 U.S. 335 (1963).

1. *Maxwell* Is No Longer Viable Under *Stare Decisis*

Because the issue raised by the Petition is a constitutional question, this Court is less constrained by the principle of *stare decisis*:

> " '*Stare decisis* is usually a wise policy, because in most matters it is more important that the applicable rule of law be settled than it be settled right. . . . This is commonly true even where the error is a matter of serious concern, provided correction can be had by legislation. **But in cases involving the Federal Constitution**, where correction through legislative action is practically impossible, **this Court has often overruled its earlier decisions**. The Court bows to lessons of experience and the force of better reasoning, recognizing that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function.' "

Edelman v. Jordan, 415 U.S. 651, 671 n.14 (1974) (*citing Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406-408 (1932) (Brandeis, J., dissenting)) (emphasis added). In addition, Jus-

tice Douglas observed that "[t]he place of *stare decisis* in constitutional law is even more tenuous" and "[s]o far as constitutional law is concerned *stare decisis* must give way before the dynamic component of history." William O. Douglas, *Stare Decisis*, 49 Colum.L.Rev. 735, 736-37 (1949).

Historically, this Court has been inclined, due to changed economic conditions and social policies, to overrule on constitutional grounds cases related to the taxing power of state governments. For example, during one thirty-year period between 1860 and 1890, this Court overruled (expressly or in effect) eighteen controlling precedents. *See, id.* In another period "from 1937-March 28, 1949", out of 30 cases the Court overruled, 21 of those were on constitutional grounds. *See, id.* And out of those 21 cases this Court overruled on constitutional grounds, the "largest group—8 in number—related to the taxing power of state and federal governments". *Id.* at 743. "Tax rates had become more burdensome than ever before in our history". *Id.*

In *Maxwell*, this Court implemented a formalistic approach acceptable in 1919 to review a New Jersey progressive inheritance tax statute that required the inclusion of the entire estate of a nonresident decedent, wherever the property was located, to determine the rate by which the New Jersey property would be taxed. The New Jersey statute subsequently reduced the tax amount to reflect the percentage of the nonresident decedent's estate located in New Jersey. *Maxwell*, 250 U.S. at 532-33. A divided Court (5/4 decision) rejected the federal constitutional challenges to the statute, including Due Process.

Five members of the Court employed a formalistic approach to decision-making and stated:

> "It is not disputed that, consistently with the Federal Constitution, **a State may not tax property beyond its territorial jurisdiction**, *but* **the subject-matter here**

> **regulated** is a *privilege to succeed to property* ***which is within the jurisdiction of the State.***
>
> * * *
>
> In the present case the State imposes a *privilege tax*, clearly within its authority, and it has adopted as *a measure of that tax* the proportion which the specified local property bears to the entire estate of the decedent. The transfer of certain property within the State is taxed by a rule which considers the entire estate in arriving at the amount of tax. *It is in no just sense a tax upon foreign property, real or personal.*"

Maxwell, 250 U.S. at 539 (emphasis added).

On the other hand, four justices, including Justice Holmes, rejected the majority's formalism. They applied an **economic realities and practical operation** approach. The economic reality was an unconstitutional deprivation of property without due process. Justice Holmes stated in relevant part:

> "It seems to me that *when property outside the State is taken into account for the purpose of increasing the tax upon property within it, the property outside is taxed in effect, no matter what form of words may be used.* It appears to me that this cannot be done, even if it should be done in such a way as to secure equality between residents in New Jersey and those in other States."

Maxwell, 250 U.S. at 544 (Holmes, J., dissenting) (emphasis added).

Since *Maxwell* was decided at the turn of the century, historic events have occurred which make *Maxwell* obsolete in light of current economic conditions and social policies in this country. For example, a result of advancements in transportation, technology, and communication is the unavoidable trend toward an international globalization of our economy. The term "interstate commerce" has a vastly different connotation and meaning in 1997 than it did in 1919. It is quite

common in 1997 for a resident of one state to earn income in several states and to be taxed accordingly. Moreover, this Court has since rejected the antiquated formalism utilized by the *Maxwell* majority. *See, e.g.*, *Wisconsin v. J.C. Penney Co.*, 311 U.S. 435, 443-44 (1940).

In *J.C. Penney*, this Court stated:

> "A tax is an exaction. Ascertainment of the scope of the exaction—what is included in it—is for the state court. **But the descriptive pigeon-hole into which a state court puts a tax is of no moment in determining the constitutional significance of the exaction**. 'In whatever language a statute may be framed, **its purpose must be determined by its natural and reasonable effect**.' *Henderson v. Mayor of New York*, 92 U.S. 259, 268. Such has been the repeated import of the cases which only recently were well summarized by the guiding formulation for adjudicating a tax measure, that '**in passing on its constitutionality we are concerned only with its practical operation**, *not its definition or the precise form of descriptive words which may be applied to it.*' *Lawrence v. State Tax Commission*, 286 U.S. 276, 280."

Wisconsin v. J.C. Penney Co., 311 U.S. at 443-44 (emphasis added).

Maxwell has been questioned by this Court and by members of the academy. *See Frick v. Pennsylvania*, 268 U.S. 473, 495 (1924) (*noting* that the *Maxwell* holding "is on the border line, as is evidenced by the dissent of four members of the court."). *See*, Walter Hellerstein, *Some Reflections on the State Taxation of a Nonresident's Personal Income*, 72 Mich.L.Rev.1308, 1317 n.53 (1974); Charles L.B. Lowndes, *Rate and Measure in Jurisdiction to Tax—Aftermath of Maxwell v. Bugbee*, 49 Harv.L.Rev. 756, 768-773 (1936) (*discussing* the application of the Maxwell holding to a progressive income tax); *id.* at 770 (stating "[i]t is difficult, however,

to imagine anything more iniquitously unfair than the application of the *Maxwell v. Bugbee* formula to income taxation in the present state of the decisions on state jurisdiction to tax income."). A jurisdiction, such as Oklahoma, may tax *all* the income *of its* ***residents***, even income earned outside the taxing jurisdiction. A taxing jurisdiction such as Oklahoma is much more restricted in its power to tax **nonresidents** and must tax only the income **derived from sources within the State**:

> "**For nonresidents**, *in contrast*, jurisdictions generally may tax **only income earned *within the jurisdiction***. See *Shaffer v. Carter*, 252 U.S. 37, 57, 40 S.Ct. 221, 227, 64 L.Ed. 445 (1920) (as to residents, a State 'may, and does, exert its taxing power over their income from all sources'; **as to nonresidents**, '*the tax is only on such income* as is derived from . . . **sources [within the State]**')"

Oklahoma Tax Comm'n v. Chickasaw Nation, 115 S.Ct. 2214, 2222 n.11 (1995) (emphasis added).

Because the issue raised by the Petition is a constitutional question and the historic circumstances present at the time *Maxwell* was decided have changed dramatically, wisdom, the rule of reason and the doctrine of *stare decisis* should lead this Court to distinguish, modify or simply overrule *Maxwell* in light of Footnote 11 in *Chickasaw Nation* and today's current facts.

2. The State Court Below Has Read *Maxwell* Too Broadly

This Court may grant certiorari to determine whether the state court has properly interpreted, applied, or extended a prior decision of this Court. *Oregon v. Mathiason*, 429 U.S. 492, 493 (1977) (certiorari granted because state court "has read *Miranda* too broadly").

The *Maxwell* decision addressed a progressive state privilege **death** tax, not a progressive state **income** tax such as contemplated by Section 2362. Moreover, in *Oklahoma Tax Comm'n v. Chickasaw Nation*, this Court clearly articulated the limits of a State's taxing power regarding a nonresident's income:

> "**For nonresidents**, *in contrast*, jurisdictions generally may tax **only income earned *within the jurisdiction***. See *Shaffer v. Carter*, 252 U.S. 37, 57, 40 S.Ct. 221, 227, 64 L.Ed. 445 (1920) (as to residents, a State 'may, and does, exert its taxing power over their income from all sources'; **as to nonresidents**, '*the tax is only on such income* as is derived from . . . **sources [within the State]**')"

Oklahoma Tax Comm'n v. Chickasaw Nation, 115 S.Ct. 2214, 2222 n.11 (emphasis added).

By relying on *Maxwell* to uphold Oklahoma's exertion of its taxing power to nonresidents' extraterritorial income **derived from sources** beyond the borders of the State, the Oklahoma Court of Appeals inappropriately extended and misapplied a prior decision of this Court. Accordingly, certiorari should issue in this case.

B. The Opinion Below Presents Important Questions Touching The Accommodation Of State And Federal Interests Under The Constitution.

This Court may grant certiorari when the state court decision seems "to present important questions touching the accommodation of state and federal interests under the Constitution." *Kosydar v. National Cash Register Co.*, 417 U.S. 62, 65 (1974). The issue in *Kosydar* was whether the assessment of an ad valorem personal property tax by the State of Ohio pursuant to its state tax laws upon certain property in storage awaiting export was in conflict with the federal Constitution's Import-Export Clause, Art.I, § 10, cl. 2, which pro-

vides exports with immunity from state taxation. The Ohio Supreme Court had interpreted the federal constitutional provision in conjunction with the State of Ohio's tax laws. Because this Court determined that "the case seemed to present important questions touching the accommodation of state and federal interests under the Constitution", certiorari was granted.

The issue raised by the Petition is whether the State of Oklahoma's inclusion of a nonresident's extraterritorial income having no nexus to the State offends the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

Because this case also seems to "present important questions touching the accommodation of state and federal interests under the Constitution", this Court should grant certiorari.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Dated: August 7, 1997.

Respectfully submitted,

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Colonel Orval Q. Matteson and Mrs. Florence B. Matteson ("Mattesons") respectfully move for leave to file the attached brief *amicus curiae*. Consent of the attorneys for the petitioners has been obtained. The consent of the attorneys for the respondent was requested but refused.

We were the pro se plaintiffs in *Matteson v. Director of Revenue, State of Missouri*, 909 S.W.2d 356 (Mo. 1995), cited by both the Petitioners and the Respondent in this case.

This case is of great concern to the *amicus curiae*.

Accordingly, Colonel Orval Q. Matteson and Mrs. Florence B. Matteson move for leave to file the attached brief *amicus curiae*.

Respectfully submitted,

/s/ KEN FEAGINS

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ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF OKLAHOMA—DIVISION NO. 1

BRIEF OF COLONEL ORVAL Q. MATTESON AND FLORENCE B. MATTESON AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION

INTEREST OF *AMICUS CURIAE*

The interest of *amicus curiae* appears in the foregoing motion.[1]

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[1] The Mattesons prepared this brief in its entirety and paid for the associated costs of providing Counsel for Petitioners with the text. See *amicus* brief at ¶ 6. *Counsel of Record* for Petitioners, Ken Feagins, thereafter paid for the printing costs and added the necessary stylistic mandates for filing purposes. Sup.Ct.R. 37.6.

STATEMENT OF THE CASE

THE MATTESONS' *AMICUS CURIAE* BRIEF

The purpose of this Brief, Petition 97-55, for consideration of the Supreme Court of the United States as a part of its contemplation on accepting Petition 97-55 for Writ of Certiorari in this case, as well as a part of its decision-making process following its anticipated acceptance thereof, is to *emphasize* the nationwide generic application of this matter to citizens who have income-producing activities in non-resident states, and the apparent contempt, *even scorn*, in which both the tax agency and the Supreme Court of a State regarded the application of the U.S. Constitution to this question.

We, the Mattesons, of Alabama, have this relationship with three states with similar non-resident taxing procedures to those of Oklahoma, i.e., taxing non-resident income, always, despite our consistent objections thereto, resulting in the wanton degradation of our personal financial status, and of the financial status of the State of Alabama through these three states' individual application of a self-serving illusion: the non-resident's total income is taxable by said state. It surely does put a "burden" on our personal income and on that of Alabama!

This Brief details this taxing situation to show the diversities and similarities of these situations with particular emphasis and application herein of our court case with the Supreme Court of one State directed at said taxing procedure. Time now does not permit details.

REASONS FOR GRANTING THE WRIT

SUMMARY OF ARGUMENT

CLARIFYING PROLOGUE

1. We, Mrs. Florence B. Matteson and Colonel Orval Q. Matteson (U.S. Regular Army, Retired), were the appellants in the before-mentioned court case, which started with the Missouri Administrative Hearing Commission with three parts, and went to the State Supreme Court as the AHC had no jurisdiction in the issue of Constitutionality and effects of taxing statutes; see Table of Authorities in said No. 97-55.

2. Throughout, without exception, the Mattesons represented themselves, with COL Matteson filling the attorney role; no professional lawyer or legal services were ever involved. Although COL Matteson has no legal training, he, in serving his last 20 years in critical assignments, four with Dept. of the Army Hq. and others near to it, has produced rooms of studies, evaluations, directives, etc. In doing so he generated policies and procedures for the Army and other Services, comparable to State Statutes or Court Briefs, as well as rules and regulations which had therein the effects of laws of the nation. Trained in Military Law he has served as attorney and judge.

3. His experience with the Missouri case opened up his knowledge to civil law as related thereto, but did not provide him with intimate details on clerical aspects such as formats, dialects and legalese, even at that level. Therefore this Brief may deviate from the norm in some respects; we ask the Court to accept such deviations and to accept our presentation on its merit.

4. Therefore, as the Mattesons are involved in the first person throughout and in the construction of this Brief, it can be expected that references to him or to them may be in the first person.

5. We have income tax relationships with Iowa and Minnesota each year, and Missouri—with Missouri, because of our ownership and management of various tracts of timberland and our occasional sale of timber, the last sale being in 1988, the sale which created the legal action previously referenced. The Missouri case involved three parts: constitutionality, authority to deduct costs of previous years' expenses never deducted on a MO return, and also inasmuch as MO had consistently ignored constitutionality in itself, the taxing per se of any retired military pay. The Iowa/Minnesota situations have never been taken to a higher level than their Internal Revenue Department.

6. Because the applications of our situations are so pertinent to the Oklahoma Case under this consideration, we were invited by Attorney Ken Feagins, attorney in said case, to participate as Friends of the Court. All costs, whatsoever, of the preparation of this Brief and its transmittal to Attorney Feagins have been borne by us, the Mattesons of 306 Reynolds Street, N.W., Jacksonville, AL 36265. No one is authorized to insert in or make changes to the text of this Brief, per se; in corporating it with whatever has to be done to present it to the Court is of course necessitated.

POINT I

THE OPINION BELOW REPRESENTS A CONTINUING SOURCE OF CONTROVERSY AND LITIGATION

STATEMENT

1. Because of time limitations the Mattesons herein will not go into a detailed discussion of the legal aspects raised in said Petition or those not included, however these pertinent observations are offered in reference to a state basing its nonresidents' taxes on income with no relationship to the taxing state, keyed to pages in the Petition.

A. P. 3a. There is no aspect of "tax equity" involved. If a resident of Oklahoma or any of our three states has income created in Alabama they are not required to pay taxes to Alabama for said income based on a rate determined by "their total taxable income" as we do, but only on their Alabama source income.

B. P. 5a. Article I. Sect. 8, of our U.S. Constitution states that Congress has the power to lay and collect taxes for the purpose of obtaining money. Is there any other purpose for laying and collecting taxes, and is not the creation of a basis for collecting tax an essential element of the laying and collecting?

C. P. 5a. Reference to this method of taxing nonresidents insofar as Missouri and we are concerned, it surely has an adverse business impact on Missouri. Although we have marketable timber and offers to buy some of our timber and/or land, because of this taxing of such proceeds against our total income we have not sold either—to Missouri's economic detriment (as well as our own).

D. P. 5/6a. If Oklahoma were not taxing a nonresident's out-of-state income a loss in said income would have no affect on the Oklahoma tax on the Oklahoma income; same for all states.

E. P.7a. The paying of a tax is impossible to construe as a donation—a gift.

F. P.7a/8a. It would be correct to conclude that the construction of a tax rate does not, per se, impose a tax on income if the application of the rate *were not* effected. It is! The effect, per se, is the exact correlative of the cause, i.e., the result of a state's law directing the incorporation of the non-resident's non-state income into the computation of the nonresident's taxable income. Thus the tax law does impose or inflict or force—"impose"—the tax per se. This, of course, does offend the IV and XIV Amendments to the U.S. Constitution.

G. P.8a. Sec. A, above. We emphasize, not just to us but also to Alabama, it is an arbitrary and discriminatory tax burden, a taking by force of our lawful assets. It is a barrier to interstate commerce, our personal dealing with Missouri's local individuals or businesses to their profit.

2. As to our personal relationships to practices of the three states, for years we have stated on the respective state returns where it is signed that the tax is being paid under protest because the tax was based on our total income. This statement was never recognized by any state; i.e., totally ignored.

3. In the Missouri case, three days after we filed on 1988 return we also sent a personal letter to the Director of Revenue restating that protest and expanding our reasoning that the inclusion of our total income was illegal and unconstitutional, and thus they had no authority to force us to pay against a rate based upon our non-Missouri income, and we claimed a refund. This also was ignored then and throughout the entire case. Through the course of this matter from 1989 to 1995 there were several letter/form exchanges between us and the Director of Revenue, and then the Administrative Hearing Commission (Briefs, Hearing), and then their Supreme Court (Briefs, etc.). All of these times we continued to press against including our non-Missouri based income and claimed a refund. In all cases this protest was in effect ignored. Ignored, Ignored, Ignored.

4. Equity was never a product of Justice. Justice was a product of Greed: Money! Yes, money from nonresidents no matter what, dominated the conduct of the Director of Revenue, The Attorney General, and their Supreme Court who apparently never read the AHC records, nor our Briefs. Nonresidents were Nonentities!

A. They ignored our protests because we initiated them rather than wait until we received some Form from the Director of Revenue authorizing a protest.

B. They just brushed off the question of constitutionality.

C. Despite our protests, and all of our Briefs, etc. prepared after I started researching the MO Statutes, that they were basing their positions on a Statute specifically restricted to *residents* rather than another Statute specifically directed to *nonresidents*, they ignored, refused to recognize, the nonresident Statute. It stated the nonresident's taxes were to be based *only* on his in-state net income, and it specifically authorized the deduction of timber expenses as we took them—which they all constantly contended we could not take—and it specifically exempted federal military pay (and they knew I was retired military from day one) and your Court had previously decreed that retired Army, such as I am, were to be considered as on "limited active duty."

D. Further, the Director of Revenue and then the Attorney General, and the Court—although each knew it years before we did—refused to recognize that by your decree my retired military pay could not be taxed, this only because we did not list it as a separate claim until I learned from my Missouri Law research that in addition to it being non-Missouri-source income, to which we had always protested, it was so declared in Missouri. Nothing in the Missouri tax instructions indicated that as per your Court's findings and the subsequent MO Court's findings, all occurring prior to the first tax return, my military retirement pay could not be included in our taxable income in any case. As we had paid our tax based in part on that retired pay as directed and had not followed some minute procedure not detailed in their tax Instructions, I could not receive a refund reflecting the deduction of my retired pay from their calculations—*this despite* your Court's directive that military retired pay could not be taxed by a state.

E. Nothing in the MO Tax Instructions applied or detailed the provision of the Statute applied to nonresidents, or applied your decree on federal retired pay. BUT, *it in detail* prescribes that the result a nonresident gets, when he calculates the tax due based on his total taxable income taken from his Federal 1040 just like a resident, it was his "MO taxable income" and

that he "may be entitled to reduce your MO income tax liability" by applying a factor resulting from the "ratio" of his total income to his MO-source income. Those are MO words, but the other states have similar expressions and procedures to direct that a nonresident's taxable income was as calculated with his total income, with a similar procedure to create a nonresident deduction.

F. Therefore, notwithstanding the accepted position that this procedure of including a nonresident's total 1040 taxable income in the State's calculation does not "tax" such non-state income, it absolutely does, as each state we have dealt with or researched prescribes that the result of the nonresident's calculations under the state's procedures results in producing that nonresident's tax due to that state, with possibly a deduction only authorized to non-residents. And, in the end, the tax due is *far larger* than it would be if only the in-state-source income were included in the procedure.

G. Truly this matter under question in unconstitutional. See Corpus Juris Secundum—Vol. 84 . . . 1-56, 85, p. 73, U.S. Standard Oil Co., Ind. v. Thorsen, C.C.A., Ind. 29F, 2nd 70B. Or see: Austin v. New Hampshire, 420 US 656 (1975). Or see: Ward v. Maryland, 79 US (12 US 11) 41B (1870). And see: 460 U.S. 582 (1983). See James v. Tel. & Tel. Corp., C.T.S. Taxation 1096, 654 S.W. 2nd 865. And see: 105 Sect. 1676 (1985). And keeping the home state of other states' nonresidents in mind as regards its protection, see: U.S. Constitution Article I, Sect. 9(5)(6); and Art. IV, Sect. 1, 2(1), and also the 1st, 5th, and 14th Amendment's Sect. 1!

H. Another thing contrary to all of the statements that nonresidents are being treated the same as residents—not so in every state's procedures for the nonresident could not take deductions authorized to residents. A case in point is the deduction for taxes paid to other states. Why? Money. Yes, considering the negative impact on the resident state involved, it loses money because it allows its citizens to deduct from their returns the tax payments made to their non-

resident states and with these procedures in question that tax is always more than it should be because it results from applying a tax rate based on payer's Federal 1040 taxable income.

5. So, this brings you back to the U.S. Constitution again, protecting each state from all other states, and from each other.

6. Based upon our intimate association and the very first-hand erosion of our personal savings accounts, we, the Mattesons of Alabama, respectfully request that you act to accept this applicable Petition 97-55, and to rule that this greedy practice of taxing the nonresident's total Federal Taxable Income, rather than only his net in-state taxable income, be halted forthwith and perhaps be retroactive to, say 1988.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

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Respectfully submitted,

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